92-14

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

IN RE: PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE, DEBTOR

MARTIN ROCHMAN, EDWARD KAUFMAN and
ROBERT C. RICHARDS

Petitioners

- v.-

NORTHEAST UTILITIES SERVICE COMPANY and
OFFICIAL COMMITTEE OF EQUITY
SECURITY HOLDERS

Respondents,

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. DOES A COURT OF APPEALS HAVE THE DISCRETION TO DISMISS AN APPEAL OF AN ORDER CONFIRMING A PLAN OF REORGANIZATION WHEN THE COURT BELIEVES, BECAUSE THE PLAN HAS BEEN IMPLEMENTED, THAT IT WOULD BE INEQUITABLE TO GRANT RELIEF?

2. DID THE COURT OF APPEALS FOR THE FIRST CIRCUIT ABUSE ITS DISCRETION WHEN, IN DETERMINING WHETHER IT WOULD BE EQUITABLE TO GRANT RELIEF, IT GAVE GREAT WEIGHT TO THE FACT THAT THE APPELLANTS HAD NOT MADE EVERY EFFORT TO GET A STAY EVEN THOUGH THE APPELLANTS HAD BEEN DENIED A STAY BY THE LOWER COURTS AND HAD NO REASON TO BELIEVE THEY HAD ANY CHANCE OF GETTING A STAY FROM EITHER THE COURT OF APPEALS OR THE SUPREME COURT?

3. DID THE COURT OF APPEALS ABUSE ITS DISCRETION WHEN, IN DETERMINING WHETHER IT WOULD BE EQUITABLE TO GRANT RELIEF, IT FAILED TO GIVE ANY WEIGHT TO APPELLANTS' CLAIM THAT THE ORDER CONFIRMING THE PLAN OF REORGANIZATION WAS CONTRARY TO LAW AND THE CONSTITUTION IN THAT IT RESULTED IN THE CONFISCATION OF THEIR PROPERTY?

4. WAS THE BANKRUPTCY COURT'S DECISION, AND THE DISTRICT COURT'S AFFIRMATION THEREOF, CONFIRMING A PLAN OF REORGANIZATION FOR A PUBLIC UTILITY CONTRARY TO LAW AND THE CONSTITUTION BECAUSE THE PROPONENTS OF THE PLAN DID NOT PROVE AND THE BANKRUPTCY COURT DID NOT DETERMINE THAT THE PLAN WOULD ENABLE THE UTILITY TO RECOVER ITS PRUDENT INVESTMENT?

PARTIES BELOW

Petitioners Martin Rochman, Edward Kaufman and Robert Richards, common stockholders of Public Service Company of New Hampshire, were appellants below. Responding to the appeal were the Northeast Utilities Service Company on behalf of its parent, Northeast Utilities, the Public Service Company of New Hampshire, the Official Committee of Unsecured Creditors and the Official Committee of Equity Security Holders.

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OPINIONS BELOW

By this Petition, RKR ask the Court to review pursuant to Rule 10.1 (c) the decision issued by the Court of Appeals for the First Circuit on May 6, 1992, in In Re: Public Service Company of New Hampshire, Martin Rochman, et. al. v. Northeast Utilities Service Company et. al. dismissing, as moot, RKR's appeal of an order ("the Confirmation Order") confirming a plan of reorganization (the "Plan") for the Public Service Company of New Hampshire (PSNH) issued by the Bankruptcy Court for the District of New Hampshire.

RKR are also hereby respectfully asking the Court to now review pursuant to Rule 11 the Confirmation Order rather than to remand the matter back to the First Circuit. RKR submit that the question that their appeal presented to the

First Circuit is of fundamental importance to the welfare of the nation and should be settled by this Court as soon as possible.

The opinion of the First Circuit is Appendix ("App.") A hereto. The court's order denying rehearing, dated May 27, 1992, is App. B. The opinion of the District Court is App. C and its judgment is App. D. None of those opinions are as yet officially reported.

The opinion that the Bankruptcy Court issued on May 17, 1990, to deal with RKR's objections to the plan of reorganization (the Plan) entitled Memorandum Opinion on "RKR" Objections Re Confirmation of Plan of Reorganization and reported at In re Public Service Company of New Hampshire, 114 Bankr. 820 (Bankr. D.N.H. 1990) is App. E. The Confirmation Order is App. F.

JURISDICTION

This petition is being docketed within 90 days of the opinion on rehearing issued by the First Circuit on May 27, 1992. The Court has jurisdiction under 28 U.S.C. § 1254(1). The First Circuit had jurisdiction by 28 U.S.C. § 158(d) and the District Court by 28 U.S.C. §158(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V, clause 3:

"[N]or shall private property be taken for public use, without just compensation."

United States Constitution, Amendment XIV, clause 3:

"[N]or shall any state deprive any person of . . . property, without due process of law; nor deny to any person . . . equal protection of the laws."

N.H. Rev. Stat. Ann. 378:27

Temporary Rates. In any proceeding involving the rates of a public utility brought either upon motion of the commission or upon complaint, the commission

may, after reasonable notice and hearing, if it be of the opinion that the public interest so requires, immediately fix, determine and prescribe for the duration of said proceeding reasonable temporary rates; provided, however, that such temporary rates shall be sufficient to yield not less than a reasonable return on the cost of the property of the utility used and useful in the public service less accrued depreciation, as shown by the reports of the utility filed with the commission, unless there appears to be reasonable ground for questioning the figures in such reports.

N.H. Rev. Stat. Ann. 378:28

Permanent Rates. So far as possible, the provision of RSA 378:27 shall be applied by the commission in fixing and determining permanent rates, as well as temporary rates. Nothing herein contained shall preclude the commission from receiving and considering any evidence which may be pertinent and material to the determination of a just and reasonable rate base and a just and reasonable rate of return thereon.

N. H. Rev Stat. Ann. 378:29

Adjustment. Temporary rates so fixed, determined, and prescribed under this subdivision shall be effective until the final determination of the rate proceeding, unless terminated sooner by the commission. In every proceeding in which temporary rates are fixed, determined and prescribed under this subdivision, the commission shall consider the

effect of such rates in fixing determining and prescribing rates to be thereafter demanded or received by such public utility on final determination of the rate proceeding. If, upon final disposition of the issues involved in such proceeding, the rates as finally determined are in excess of the rates prescribed in such temporary order, then such public utility shall be permitted to amortize and recover, by means of a temporary increase over and above the rates finally determined, such sum as shall represent the difference between the gross income obtained from the rates prescribed in such temporary order and the gross income which would have been obtained under the rates finally determined if applied during the period such temporary order was in effect.

STATEMENT OF THE CASE

On January 28, 1988, Public Service Company of New Hampshire ("PSNH") became the first electric utility since the Depression to file for protection from its creditors under Chapter 11 of the Bankruptcy Code and perhaps the first, ever, to be forced to do so by government regulation rather than economic forces.

In 1974, PSNH undertook with other utilities in New England to build the

the Seabrook Nuclear Generating Station ("Seabrook"). The State of New Hampshire (the "State") supported the project but in 1979 after PSNH had invested a substantial amount of money in the project, the State passed its "anti-construction-work-in-progress (CWIP) law" (N.H. Rev. Stat. Ann. § 378:30-a) and thereby prohibited PSNH from recovering a return of, or on, its investment until Seabrook went on line.

PSNH was able to complete construction of Unit 1 in 1986, but it could not then get an operating license from the Nuclear Regulatory Commission (the "NRC") because Massachusetts refused to cooperate in developing an emergency evacuation plan.

In 1987, PSNH asked, but the State refused, to grant PSNH emergency relief from the anti-CWIP law. On January 26, 1988, the Supreme Court of New Hampshire

held that the law could be applied to Seabrook without violating the Constitution even if it forced PSNH into bankruptcy. Petition of Public Service Company of New Hampshire, 130 N.H. 265, 539 A.2d 263 (1988). It reasoned that the law merely allocated the risk of failure to the stockholders and did not deprive PSNH of a reasonable opportunity to recover its investment. It acknowledged, however, that if and when Seabrook did go on line, the stockholders would be entitled to a return that compensated them for the greater risk that they had been forced to run and, as a consequence, the rate payers would probably have to pay more for power from the plant. Id 130 N.H. at 269, 539 A. 2d at 270.[1]

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[1] PSNH's subsequent appeal to this Court was dismissed for want of a properly presented federal question. Public Service Company of New Hampshire v. New Hampshire, 488 U.S. 1035 (1989).

Two days later, PSNH filed in Chapter 11. It was expected that bankruptcy would merely defer, not discharge, its obligations and would also impose additional crushing costs on PSNH and its ratepayers. But that did not happen. The State, with the aid of Northeast Utilities (NU), has managed to exploit the processes of the bankruptcy court to avoid not only the expected consequences of bankruptcy but the expected consequences of its anti-CWIP law.

The Plan and Rate Agreement

The Plan, as described in the Disclosure Statement, extracts of which are attached hereto as App. G, was to be a two step plan. By the first step, PSNH would be reorganized into a new company (hereinafter referred to as "Reorganized PSNH"). By the second, a wholly owned subsidiary of NU would purchase all of the common stock of Reorganized PSNH at

$20 per share and another wholly owned subsidiary would take title to PSNH's interest in Seabrook. The first was conditioned, as required by Section 1129 (a) (6) of the Bankruptcy Code, on the New Hampshire Public Utilities Commission (the "NHPUC") approving the rate agreement (the "Rate Agreement") embodied in, and at the heart of, the Plan. The second step was conditioned on the merger being approved by the Securities and Exchange Commission ("SEC"), the Federal Energy Regulatory Commission ("FERC") and the NRC.

The Rate Agreement was negotiated by NUSCO for NU and the Governor and Attorney General for the State during 1989, and executed on November 22, 1989. They intended that it would be binding on PSNH if embodied in a confirmed plan of reorganization and approved by the NHPUC.

The Rate Agreement provided that

Reorganized PSNH would be permitted to increase its average retail rates by 5.5% each year for seven years. The first increase went into effect on January 1, 1990, with the revenues held in escrow until the Plan was implemented. The second would occur on the date the first step of the Plan was implemented and the subsequent five increases would occur on the anniversaries thereof. Thereafter, Reorganized PSNH's rates would be fixed at a level that would enable it to recover its cost of service calculated in the traditional manner.

The Rate Agreement also provided that Reorganized PSNH would hold assets initially that had a book value of approximately $2.3 billion consisting of approximately $800 million of non-Seabrook assets and approximately $1.5 billion of PSNH's $2.9 billion (as January 1, 1990) investment in Seabrook. The

remainder of PSNH's investment in Seabrook would be written off and never recovered.

Seabrook would be booked at $700 million and depreciated on a straight line basis over Seabrook's expected life of 39 years. The other $800 million of Seabrook would be booked as an "Acquisition Premium", $425 million of which would be written off in 7 years and $375 million, in 20 years.

As a result of these write-offs,, NU expected that Reorganized PSNH's rates would be essentially flat or even decline a bit over the three years following the 7 year fixed rate period and that at the end of 10 years, Reorganized PSNH's rates would be lower in real terms than they were in 1990.

Thus, if the Rate Agreement were fully implemented, PSNH's ratepayers would suffer almost no real pain as a re-

sult of all the wrongheaded policies that had converged on Seabrook.

The investors, on the other hand, especially the common stockholders, would suffer severe pain.

PSNH would write off, under the best of all possible scenarios covered by the Plan (Seabrook operates and the merger occurs) at least $1.5 billion of its $2.9 billion (as of January 1, 1990) investment in Seabrook. The unsecured creditors and preferred stockholders would "give up" about $462 million (App E at 97a.) and therefore the common stockholders would lose at least $1.038 billion. The common stockholders would receive at most $163.5 million, (App. G at 261a) and thus at most about 14 cents on every dollar they had invested in PSNH as of Janu-

ary 1, 1990. [2]

The Petitioners

RKR began to participate in the process in November of 1989 after the deal had been negotiated and the disclosure statement for the Plan (the "Disclosure Statement") had nearly been finalized.

Mr. Rochman was appointed to the Equity Committee in November of 1989 and when he understood the impact of the Plan on the common stockholders he immediately announced his opposition. He also asked the Trustee to appoint a separate committee to represent the common stockholders when he discovered that the Equity Committee was dominated by pre-

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[2]The first step of the Plan was implemented on May 16, 1991, and the common stockholders then received securities that had a market value of about $3.71 per share, or, assuming a discount rate of 12% a year, about $3.00 per share or 10 cents on the dollar as of January 1, 1990.

ferred stockholders (App. G at 253a) and therefore could not properly represent the common stockholders. His request was denied.

Mr. Richards is a lawyer and worked 17 years for the Long Island Lighting Company (LILCO) as a lawyer and corporate planner while LILCO experienced its difficulties with licensing, building and recovering its investment in Shoreham. App. E at 122a. He was introduced to Mr. Rochman in early December, 1989, by Mr. Donald Smith, whose company was a major holder of common stock in PSNH (App G at 287a), and who, along with his associate Mr. Richard Greenberg, were the only members of the Equity Committee during the development of the Plan that held only or mostly common stock. Mr. Smith told Mr. Richards that he had opposed the Plan but did not believe it could be stopped. He and Mr. Greenberg had re-

signed from the committee shortly after the Plan was negotiated but before it had been formally approved by the committee. The Trustee apparently appointed Mr. Rochman to replace them and give the common at least some representation on the committee.

Dr. Edward Kaufman is a major stockholder in PSNH and responded in January of 1990 to Rochman's and Richards's efforts to solicit opposition to the Plan.

Together RKR held about 200,000 shares of common stock in PSNH and thus substantially more than all of the former directors and officers of PSNH combined (App. G at 288a) and, RKR believes, substantially more than held by all the other current or former members of the Equity Committee, other than Mr. Smith, and all the other persons actively involved in the case.

RKR's Efforts to Defeat Confirmation of the Plan

In early 1990, RKR made some efforts to change the Disclosure Statement to better reflect RKR's view of PSNH's rights in a rate case and to prevent its issuance. The Bankruptcy Court rejected all those efforts.

RKR also moved the bankruptcy court to create a common stockholder committee that would have the expertise and resources necessary to effectively represent the common stockholders at the confirmation hearing and in any appeal of any confirmation order. The bankruptcy court denied that request. In re Public Serv. Co. of N.H, 116 Bankr. 347 (Bankr. D.N.H. 1990).

RKR then submitted detailed objections to the Plan.

RKR contended therein that the impact of the Plan as set forth above and

as described in the Disclosure Statement was grossly unfair to the common stockholders. RKR also contended therein that the Plan had been accepted by the Equity Committee only because the Equity Committee was dominated by preferred stockholders and did not truly represent the common stockholders and had been supported by management of PSNH only because management was more concerned about the welfare of the ratepayers and its own welfare than the welfare of the stockholders as evidenced by the fact that it had written off about $1 billion of Seabrook for financial statement purposes (but not for ratemaking purposes) for political reasons (see App. G at 282a-284a) and had received substantial severance benefits as part of the Plan. App. G at 254a). RKR also contented that the Plan had been accepted by the common stockholders only because the Disclosure

Statement had represented that the NHPUC had essentially unfettered discretion to set rates and that for that reason PSNH could not expect to do better in a rate case. (App. G at 263a-281a).

More specifically RKR contended that the Plan was inconsistent with PSNH's right under New Hampshire law (N. H. Rev Stat. Ann. 378:27) and guaranteed by the Constitution to recover its prudent investment in Seabrook. The Disclosure Statement revealed that all of the prudency audits had concluded that at least 75% of the project had been prudently incurred and the audit done for the NHPUC had concluded that 93% was prudent. App. G at 272a. Given those audits and the absence of any other information on the subject, and the fact that the Rate Agreement rates would hardly keep pace with inflation, RKR contended that NU could not possibly prove, and the Bank-

ruptcy Court could not possibly determine, as the court said it must, that the result of the Rate Agreement was within the range of outcomes of a Seabrook rate case, and therefore could not possibly determine that the Plan was fair and equitable to the common stockholders. The prudency audits indicated that it was in effect at least $750 million short of being within the range of what could come out of a rate case.

RKR acknowledged in its objections that PSNH could probably not recover all of its investment in Seabrook in the traditional manner, i.e. on a straight line basis over its useful life, or even pursuant to a 10-year "phase-in" as permitted by the Financial Accounting Standards Board ("FASB") but argued that PSNH could certainly recover much more than 50% with a 10 year phase-in. They also argued that PSNH did not have to follow

FASB's rules when setting rates and could recover substantially more than 50% of Seabrook if it changed to another method of depreciating Seabrook for ratemaking purposes and implemented in effect a longer than 10 year phase-in.

RKR pointed out that consultants to the industry had been saying for years that straight line depreciation of long lived utility investments was irrational and contrary to the public interest. Straight line depreciation causes the "revenue requirement" (and therefore rates) to increase greatly (the so called "rate shock") when a large investment (even an economic one) first goes on line, and then to decline over the life of the investment, while the value of the services that the asset will provide will probably increase with inflation over the full life of the asset.

RKR argued that PSNH should change,

and the PUC should permit it to change, to a depreciation method that would cause the revenue requirement to rise rather than fall over Seabrook's life and give PSNH a better chance to recover its prudent investment in Seabrook.

RKR supplied some analyses with their objections that indicated that PSNH could recover at least 75% of its investment in Seabrook with a 10-year phase-in plan and even more with a longer phase-in and with rates that were no higher than the rates analyzed by Bower, Rohr & Associates, as described in the Disclosure Statement (App. G at 275a) and thus with rates, according to that study, that would not impose an excessive burden on the economy.

RKR also pointed out that recovering most of Seabrook would be burdensome mainly because PSNH would have to have a substantial equity ratio to protect it-

self from regulatory risk and as a consequence would have to pay substantial income taxes to the federal government. RKR suggested that the State could and should avoid that by causing its Energy Authority to buy PSNH's securities for a fair price - $3.4 billion or so. RKR noted that the State could thereby honor its obligations to the investors and the Energy Authority could recover the purchase price and its other costs with rates that were probably lower than the Rate Agreement rates.

NUSCO responded to RKR's objections in a manner that was consistent with the description of PSNH's rights and the NHPUC's power in the Disclosure Statement. It argued that the PUC had very broad if not unfettered discretion to set just and reasonable rates and could deny the recovery of prudent investment if necessary to set what it considered to be

"affordable rates"; that PSNH could not expect to recover more than $1.8 billion of Seabrook because management had already said that it would not try to recover more; that rates must be set in conformance with GAAP and FASB's 10-year phase-in rule and therefore a change to some other depreciation or amortization method was not possible; and that if PSNH tried to recover its entire[3] investment

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[3]NUSCO's strategy was to set up a straw man and then knock it down. It claimed that RKR's position was that PSNH was entitled to recover all of Seabrook and then showed that it was not possible to recover all of Seabrook in conformance with FASB's rules. But RKR never claimed that PSNH was entitled to recover all of its investment but only all of its prudent investment and fully expected that the NHPUC would impose a prudency "hit" of some amount. RKR objected to the Plan because it in effect imposed a hit of substantially more than 25%, the most that could be supported by the prudency audits. If the hit had been only 25%, PSNH would have recovered $750 million more as of January 1, 1990, than the Plan will achieve and the common stockholders would have received about $300 million more as of that date and still more as of any subsequent date.

in the traditional manner, or even pursuant to a so called 10 year phase-in, it would lose much of its loads to cogeneration and municipalization. It also said that the State was no longer interested in buying PSNH.[4]

NU sponsored several witnesses to support their arguments. Those witnesses generally said that they thought the Plan was fair but none of them offered any evidence to show that the Plan was consistent with PSNH's right to recover prudent investment. They all in effect said the Plan was fair because they assumed, as NUSCO claimed, that the NHPUC had the power to set rates pretty much as it pleased.

Richards cross examined NU's witnesses and testified himself to place

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[4]To prove that, the State repealed the statute creating the Energy Authority during the confirmation proceeding. App. E at 72a.

RKR's objections into evidence and to rebut NU's criticism's of RKR's objections. The court excluded much of what Richards offered.

The Confirmation Order

Seven days after the close of the hearing, the Bankruptcy Court issued the Confirmation Order. A month later, on May 17, 1990, it issued its opinion dealing with RKR's objections.

The court said that PSNH did not have the right to recover its prudent investment but only prudent investment in used and useful plant and the PUC had the power to "evolve" the used and useful principle as necessary to effectuate an appropriate sharing of the cost of excess cost power plants. App. E at 146a. It acknowledged that this Court had said that a "shift in methodologies" in midstream could raise serious constitutional questions but rejected RKR's contention

that a departure from the prudent investment rule for Seabrook would represent a shift in methodologies. App. E at 145a. It also said that even if PSNH could achieve more in a rate case, intervening interest would consume any additional value (App. E at 154a). It thus subscribed to the notion, advanced by the Equity Committee and NUSCO, that the State could effectively deny recovery by simply delaying recovery, despite the fact that New Hampshire laws (N.H. RSA 378:27, 29) specifically say that PSNH would be entitled to a temporary rate increase as soon as Seabrook went on line that covers prudent costs or a surcharge on the permanent rates that recoups the difference.

The Bankruptcy Court determined for the above reasons that PSNH could not expect to recover <u>all</u> of its investment in Seabrook (App. E at 150a) and then, in

a classic non sequitur, concluded that the Rate Agreement, that would enable PSNH to recover only at most 50% of Seabrook, was a reasonable compromise.

RKR's Appeal To the District Court

RKR appealed the Confirmation Order to the District Court. RKR claimed therein that the Bankruptcy Court's opinion was clearly erroneous because it was contrary to PSNH's constitutional rights and irrational.

RKR recognized, when they initiated their appeal, that they probably could not get a stay of the confirmation order pending the appeal. They did not believe they could convince any appellate court, not even this Court, that they were likely to succeed on the merits of their appeal before such court was actually ready, after hearing all arguments, to decide the merits in their favor and they knew they could not put up a bond suffi-

cient to protect the other parties. But they also did not believe they needed a stay because they did not believe they would be irreparably damaged if they did not get one.

From the beginning, RKR believed that if they were successful the Plan could be modified, even if it had been fully implemented while their appeal was pending, to give them and the people they represented effective relief without adversely affecting anyone that had relied on the Confirmation Order. They believed that that could be done because if they were successful PSNH would be able to achieve much greater value in a rate case and that additional value could be allocated to the impaired classes of PSNH without injuring the persons who had invested in Reorganized PSNH by converting the common stock of Reorganized PSNH into a preferred stock that paid a divi-

dend that caused that stock to trade at least initially at $20 per share and then issuing a "new" common stock to those persons that held impaired interests in PSNH on the date the Plan was implemented. RKR recognized that it would have to be determined at a later date how the "new" common stock would be allocated, but believed that since all the impaired classes would be pleased to get more than they got from the Plan, they should be able to agree on a fair allocation. In sum, from the beginning RKR believed that if they were successful, providing fair an effective relief would be a rather simple matter.

On the other hand, RKR was well aware of the cases that suggested that if they did not ask for a stay, their appeal might be dismissed as "moot" simply because they had not asked. So they asked.

They asked the Bankruptcy Court and

on June 19, 1990, that request was denied. In re Public Serv. Co. of N.H. 116 Bankr 347 (Bankr. D.N.H. 1990). The Bankruptcy Court noted in particular that a stay would jeopardize the financing and impose substantial costs on other parties. It also noted that although it could grant a stay if RKR put up a bond, any such bond would have to be "massive".

On July 23, 1990, RKR filed a document with the District Court which it entitled "Motion For Declaration That Appeal Will Not Be Mooted By Substantial Consummation of Plan of Reorganization, Or, In The Alternative For A Stay Of Confirmation Order Pending Appeal". The document thus reflected RKR's view that they did not need a stay unless their appeal might otherwise be dismissed. RKR described therein how it thought the Plan could be modified if RKR's appeal was successful and argued that such a modifi-

cation would give everyone that had relied on the Confirmation Order at least as much as they expected from the Plan and would allow the impaired classes to share in whatever additional value would come out of the rate case.

That motion was refused by the District Court because RKR had not first attempted to get the appellees consent to the motion. RKR did not resubmit the motion because it then appeared that it might not be necessary to impose that burden on the District Court.

NUSCO had by then indicated that it would not implement the Plan until the Supreme Court of New Hampshire had affirmed the approval of the Rate Agreement by the NHPUC. Since RKR's appeal of that approval had not yet begun and RKR's appeal of the Confirmation Order was well underway, RKR expected the District Court to issue a decision on the merits of

their appeal before the Supreme Court of New Hampshire issued a decision in their appeal of the NHPUC order. RKR was obliged to file and prosecute their appeal rather quickly and assumed that the law obliged the District Court to decide it quickly as well. RKR therefore decided not to resubmit the motion unless and until implementation appeared imminent.

In early 1991, it appeared likely that the Supreme Court of New Hampshire would soon issue an opinion, and so on February 6, 1991, RKR filed a motion for a stay with the District Court. They again set forth their view that a stay was necessary only if the court might otherwise dismiss their appeal and also set forth how they thought the Plan could be modified if their appeal were successful. The District Court never ruled on that motion.

On April 21, 1991, the Supreme Court

of New Hampshire affirmed the NHPUC approval of the Rate Agreement. Appeal of Richards 134 N.H. 148. (1991) cert. denied 112 S. Ct. 275 (1991).

On May 16, 1991, NUSCO implemented the first step of the Plan. About $1.53 billion in cash, approximately $205 million in contingent notes, the new common stock and warrant certificates to buy NU stock were distributed to interests in PSNH.

To raise the cash, Reorganized PSNH issued about $342 million of first mortgage bonds, $516 billion of industrial development bonds, and $125 million in preferred stock and borrowed another $490 million.

On June 6, 1991, NUSCO moved the District Court to dismiss RKR's appeal on the grounds that it was then moot making all the arguments that it later made to the First Circuit. RKR objected to the

motion claiming for all the reasons it had set forth in its motion for a stay that effective relief was possible and that if the District Court dismissed the appeal the court would be abusing its discretion. The District Court did not rule on NUSCO's motion and thus effectively denied it.

On August 6, 1991, RKR's patience with the District Court ran out and they filed a petition for a writ of mandamus with the First Circuit asking that court to order the District Court to rule on the merits of their appeal.

Two weeks later, on August 21, 1991, before anyone had responded to RKR's petition, the District Court issued its decision affirming the Confirmation Order. The District Court stated therein that the Bankruptcy Court's opinion was "well crafted" (App. C at 55a) and with regard to RKR's constitutional arguments,

stated:

> "Appellants misplace reliance on what they perceive to be an "etched-in-stone" rate making analysis grounded on a rate base which includes only property "used and useful" in the generation of electricity in which the utility's investment was "prudent" at the time made. Appeal of Conservation Law Foundation, 127 N.Y. 606, 637-38, 507 A. 2d 652, 673-674 (1986). Not only may legislators give specific instructions to their utility commissions, Duquesne Light Co. v. Barasch, 488 U.S.299, 313 (1989), but the prudent investment rule is not a constitutional standard. Id. at 315 "

App. C at 56a.

Although the District Court affirmed the Confirmation Order, it rejected the Bankruptcy Court's rationale. The Bankruptcy Court held that PSNH has the right to recover prudent investment in used and useful property but that the NHPUC has the power to evolve the used and useful concept to affect a fair sharing of the cost of Seabrook. The District Court, however, held that Duquesne meant that the State can, if it wishes, change its

rules at any time and in any manner.

On August 26, 1991, NUSCO filed with the First Circuit a "Suggestion of Mootness" to the effect that since the District Court had issued its decision, RKR's petition for a writ of mandamus was moot. RKR concurred and on September 5, 1991, the First Circuit dismissed the petition as moot.[5]

RKR's Appeal to the First Circuit

On September 13, 1991, RKR filed with the First Circuit and on November 13, 1991, NUSCO filed its motion to dismiss. In response, RKR again pointed out how, if they were successful, the Plan could be modified to provide effective relief.

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[5] For some reason, the First Circuit chose to ignore the record and suggest that it had dismissed RKR's petition for a writ of mandamus before the District Court had ruled (App. A at 8a) and because the Plan had been implemented three months earlier. App. A at 17a.

RKR also argued that if they were successful, there was no chance that the persons who had invested new money in Reorganized PSNH in reliance on the Confirmation Order would be adversely affected. In order for Reorganized PSNH to pay a return of, and on, the $1.5 billion of new money, it would only have to recover about $700 million of Seabrook and Reorganized PSNH's rates were already high enough to provide such a return.

RKR acknowledged that their success might cause Reorganized PSNH to be in default on their credit agreements if, and only if, the banks chose to claim a default, but argued that there was no chance that Reorganized PSNH would not honor its obligations on those agreements so there was no chance that such persons

would be hurt by RKR's success. [6]

RKR acknowledged that the State might be tempted, in response to RKR's success, to lower PSNH's rates initially, pending resolution of the rate case. However, RKR also pointed out that the NHPUC had said in its order approving the

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[6] In fact RKR's success would make those new investments more secure because PSNH would then achieve much greater value. Also, RKR's success would mean that the State was going to be held to its promises.

Reorganized PSNH's new credit agreements contemplate the possibility that the State might renege on the Rate Agreement. And the State's Senate has already approved legislation to eliminate some of the protective provisions in the Rate Agreement. PSNH claims that any such change would raise "serious constitutional questions" (See PSNH's SEC Form 10-K for December 31, 1991 at 2-3) but it is apparent that by proposing the Plan and getting it confirmed, NUSCO has taught the State that it can breach its agreements with PSNH without running afoul of the Constitution. And if RKR's petition is not accepted and their appeal not ultimately successful, the Court will confirm that lesson, and NU may find that the Rate Agreement is not worth the paper it was printed on.

Rate Agreement that "[t]here is substantial evidence supporting a possible commission allowance of $1.5 billion for Seabrook in stand-alone PSNH's rate base" even though it assumed, apparently, that it was not obliged to allow PSNH to recover its prudent investment (Re Northeast Utilities/Public Service Company of New Hampshire, 114 PUR 4th 385 (N.H.P.U.C. 1990)) and that therefore, if RKR were successful, PSNH would be entitled immediately to a substantial temporary rate increase sufficient to recover at least $1.5 billion of Seabrook. NH RSA 378:27 Or in other words, if RKR were successful, third persons who had invested new money in PSNH would be adversely affected only if the State ignored its own law as well as the mandate of whatever court reversed the Confirmation Order.

RKR acknowledged that they could not

"guarantee" that the equity holders in PSNH would do better in a rate case, but argued that if RKR were successful in establishing that PSNH had the right to recover its prudent investment, the existing prudency audits indicated that PSNH's chances of achieving substantially greater value in a rate case were extremely good. They also pointed out that if they were successful, it was quite possible that the State would respond by reviving the Energy Authority and causing that agency to make an offer to buy PSNH at a fair price.

And, finally RKR noted, that if NUSCO implemented the merger pending the appeal, NU would then hold all of Reorganized PSNH's common stock and be the only person that could conceivable be

injured by RKR's success.[7] But since NU had in effect conspired with the State to exploit the bankruptcy process to confiscate PSNH's property, the court should not be concerned if RKR's success results in some damage to NU.

NUSCO argued in response that the Plan could not be modified as RKR had suggested because the holders of new preferred stock had a veto over the issuance of any additional preferred. RKR noted that Reorganized PSNH could solve that problem very simply by issuing a new preferred or a "preference" stock that was junior to the existing preferred. The holders of the existing preferred would have no reason to object to the issuance of such a new preferred or preference stock and probably would not do so.

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[7]NUSCO implemented the merger on June 5, 1992.

NUSCO claimed that it was important that investors in reorganized companies be able to rely on confirmation orders. RKR responded that it was at least as important to the welfare of the nation that investors in utilities be able to rely on the promises made by the states in their statutes and case law and representations by this Court and other courts that their investments were protected by the Constitution.

But all to no avail.

On May 6, 1992, the First Circuit dismissed RKR's appeal, and on May 27, 1992, it denied, without further discussion, RKR's petition for rehearing.

It said that implementation of the plan left the court "powerless to grant fair and adequate relief"(App. A at 32a) but it is apparent that it dismissed RKR's appeal, not because it thought it was impossible to grant effective relief,

but rather because it thought doing so would be inequitable to everyone else involved, including the Bankruptcy Court and also, it seems, to itself.

At the very outset the First Circuit stressed that RKR were "three stockholders" (App.A at 1a). Apparently it did not believe that it should have to decide such a complicated appeal brought by only three stockholders when the stockholders as a class had accepted the Plan.[8] It seems that it decided to dismiss the appeal for that reason and then proceeded to list all the support it

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[8]It is noted that RKR has received financial support for its efforts from about 2000 other stockholders that held holding more than 1,000,000 additional shares. And of course although the common stockholders accepted the Plan as required by the Bankruptcy Code, they did so in response to a Disclosure Statement that indicated that PSNH had essentially no rights in a rate case. App. G at 268a-269a. And even then less than 40% of the stockholders actually voted to accept the Plan.

could muster for its decision and ignored everything that might detract from it.

It said that granting relief to RKR would adversely affect third parties and that it had no jurisdiction to impose substantial adverse consequences on those absent (App. A at 31a), but it did not explain how granting the relief RKR was requesting would adversely affect any such persons substantially, if at all.

It said it would rearrange the stage on which the financial calculations of investors were made (App. A at 30a) but did not explain how that rearrangement would adversely affect the persons who had invested new money in Reorganized PSNH.

It rejected RKR's "restructuring scenario" because the holders of existing preferred had a veto over the issuance of additional preferred, (App. A n 17 at 28a) and failed to even acknowledge that

RKR's proposed solution to that problem.

It said that "unraveling" the Plan would present an impossible problem for the Bankruptcy Court but it did not explain why it was necessary to even consider "unraveling" the Plan since RKR was not seeking such relief and it was unlikely, if RKR were successful, anyone else, would demand it either.

It listed in great detail all the ways that RKR had failed to pursue a stay with all possible diligence. But it failed to explain how RKR could have gotten a stay even if they had pursued one with greater diligence.

It noted that RKR could have gotten a stay if they had put up a bond. It said that it recognized the difficulties in putting up a bond, but noted that RKR had not offered a bond of any amount. App. A at 17. It thus suggested that RKR might have been able to get a stay if

they had offered a bond that covered less than all of the parties potential damages but failed to explain how that was possible.

It also said that the Bankruptcy Court opinion was "comprehensive and well-reasoned" (App. A at 6a) and noted that RKR's claims had been "roundly rejected in every venue" (App. A at 29a). It thus indicated that RKR could not have convinced it, any more than it was able to convince the lower courts, that RKR was likely to win on the merits of its appeal and thus satisfy that requirement for a stay.

In sum, the Court justified its action at least in part by pointing to RKR's lack of diligence in pursuing a stay, but its own opinion supports RKR's view that they could not have gotten a stay no matter how vigorously they had pursued one.

And then the First Circuit refused to acknowledge that this case was in any way unique.

It gave no weight whatsoever to RKR's claim that the Confirmation Order allowed the State and NUSCO to take PSNH's property for less than just compensation. It expressed great concern for the persons who had invested new money in reliance on the Confirmation Order, but showed no concern whatsoever for the thousands of persons that had invested their money in PSNH in reliance on New Hampshire law and the representations by this Court and others that the Constitution provided their investments with some real protection. It expressed concern for the impact a reversal would have on the policy favoring finality of bankruptcy proceedings but no concern for the impact a failure to reverse would have on the nation's faith in the promis-

es of their governments and its faith in, and respect for, the Constitution.

REASONS FOR GRANTING THE WRIT

The First Circuit Erred In Dismissing RKR's Appeal

This Court has held that an appeal must be dismissed as moot when the courts can not provide a remedy. Mills v. Green, 159 U.S. 651 (1895). It, however, has never held that a court of appeals can dismiss an appeal of a confirmation order merely because such court believes that it would be inequitable (to the parties or to the Bankruptcy Court) to grant relief, but that is what the First Circuit has done in this case.

This petition therefore presents the question of whether a court of appeals has the discretion to dismiss an appeal simply because it believes it would be inequitable to grant the relief requested and if so, the question of whether the

First Circuit abused that discretion in this case.

RKR submits that the Court should prohibit the courts of appeal from exercising such discretion and instead require them to decide every case on the merits unless it is impossible to grant effective relief. RKR also submits that the Court should require them, if and when they decide an appeal in favor of the appellant, to send the case back to the trial court, to have that court determine, with the aid of the parties, what would constitute fair and effective relief.

RKR submits that such a rule is essential because it is impossible for a court of appeals to determine whether it would be equitable (as opposed to impossible) to grant effective relief until an appeal has been decided on the merits and the rights of all parties determined.

Here for instance the First Circuit says that the relief RKR has proposed would be inequitable but it is impossible to determine at this time whether anyone involved in the case after the Confirmation Order is reversed would object to it.

Such a rule is also desirable because otherwise the Court would be obliged to review a petition for a writ of certiorari with regard to every such dismissal to determine whether the court of appeals properly balanced the equities or instead abused its discretion and denied the appellant his right to appeal.

And, of course, if this Court should adopt such a rule, the First Circuit clearly erred and its decision must be reversed because it would surely be possible to grant the relief RKR is requesting. The task of modifying the Plan as RKR has proposed might be more diffi-

cult than RKR imagines but it is surely much simpler than the tasks the federal courts have on occasion tackled with much less provocation.

The federal courts broke up AT&T for violations of the anti-trust laws. Requiring NU to spin off PSNH, as RKR has suggested, would be far simpler than breaking up AT&T and it is surely as important to protect private property from confiscation as it is to enforce the anti-trust laws.

Therefore, RKR submits that the Court should accept this petition, adopt the aforementioned rule and reverse the First Circuit's decision.

But even if the Court is of the view that the courts of appeal should have some discretion to dismiss appeals whenever they believe it would be inequitable to grant relief, the Court should nevertheless accept this petition because the

First Circuit surely abused whatever discretion it had.

The First Circuit weighed very heavily the fact that RKR did not seek a stay with all possible diligence, even though it is apparent that RKR had no reason to believe that they could get a stay. The court relied, as NUSCO urged, on In re Roberts Farms, Inc. 652 F. 2d 793 (9th Cir. 1981), but Roberts Farms provides no support for that proposition. The 9th Circuit held in Roberts Farms that relief was in fact impossible and therefore its suggestion that the appellant's failure to ask for a stay from a Justice of the Supreme Court was an independent grounds for dismissal was mere dicta. It is simply impossible to know whether the 9th Circuit would have dismissed the appeal there simply because the appellants had failed to ask for a stay, if relief had in fact been possi-

ble.

And such a rule surely is contrary to the public interest. It forces an appellant to pursue a stay even when he does not believe he needs one or is entitled to one. It simply creates more work for attorneys and imposes more burdens on the courts and the justices of this Court. And it puts an appellant in the illogical position of having to argue, first, that if he is not granted a stay he will be irreparably injured but then, if he does not get the stay, that it is nevertheless possible to grant him effective relief. Surely, it is an abuse of discretion and/or a denial of due process for the courts to put an appellant in such an impossible position.

Therefore, the Court should instruct the courts of appeals to determine whether an appeal should be dismissed without regard to whether an appellant pursued a

stay with all possible diligence.

And RKR also submits that the First Circuit abused its discretion when it failed to take into account the unique nature of RKR's claim and its request for relief.

RKR submits that when an appellant is claiming a violation of the Constitution, his appeal of a confirmation order should not be dismissed, regardless of what the rule might be in other cases[9], unless it is absolutely impossible to grant him fair and effective relief. The courts of appeal should be required to balance the injury to persons that allegedly relied on the Constitution, if the appeal is dismissed, with the possible damage to persons that have relied on the confirmation order, if the appellants are

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[9]Such a claim presumably could only happen in a utility bankruptcy and may in fact never happen again.

successful and the relief they are requesting is granted. And clearly, if the First Circuit had taken into account the interests of the former as well as the latter, it would have concluded that on balance fair and effective relief can be and should be granted.

If RKR are successful, it is more than probable that everyone that relied on the Constitution will be better off and no one that relied on the confirmation order will be no worse off. RKR can not guarantee that result but, given the results of the prudency audits, it is certainly the most likely result.

And RKR would not even expect that NU would be adversely affected by RKR's success. NU, now that it has acquired PSNH, would be required to spin off PSNH (unless some other adequate arrangement can be worked out) but RKR fully expects that NU would get cash and/or securities

in Reorganized PSNH (debt or preferred stock) that are worth at least as much as its investment in Reorganized PSNH.

Nor is RKR contending that the ratepayers of PSNH should be adversely affected. From the very beginning, RKR urged the State to revive the Energy Authority and cause it to buy PSNH at a fair price. And RKR fully expects that if they are successful, the State will be inspired to do that because it would be very much in the State's interest.

In sum, RKR submits that given the nature of their complaint and given the fact that effective relief can probably be granted without adversely affecting any innocent third parties, the First Circuit's dismissal of their appeal must be viewed as an abuse of whatever discretion it may have had.

The Bankruptcy Court's Decision Was Contrary to Law and the Requirements of the Constitution

This case is ultimately about whether PSNH has a right to recover its prudent investment in Seabrook.

This Court held in Duquesne Light Co. v. Barasch, 488 U.S.299 (1989) that a utility does not have a right to have its rates calculated to recover its prudent investment explicitly. It said then as it had said many times before that the Constitution is concerned about consequences of rate orders and not methods of setting rates. But the Court did suggest that a rate order must nevertheless enable the utility to recover its prudent investment at least when a state represents that a utility will have that right and a utility relies on that representation. It suggested that a state is free to apply some other measure of determining just and reasonable rates but that

when a state changes from one method to another it raises serious constitutional questions.

Until Seabrook was almost finished New Hampshire represented to PSNH and its investors that PSNH was entitled to recover its prudent investment, even if its rates as a consequence would have to be very high. The NHPUC in a decision issued in 1985 approving the final financing of Seabrook said as much. Re Public Service Co. of New Hampshire, 70 NHPUC 886. It first determined that the rates necessary to recover all of Seabrook although very high, and higher than the Rate Agreement rates, would nevertheless be just and reasonable and then said:

> " A lower level of rates within the range of reasonable probabilities will be set if we find in a substantial rate proceeding that the prudent investment is less than the Company's total investment . . . "

Id at 903.

It was not until 1986 in the appeal of that NHPUC decision and after Seabrook was nearly finished did the Supreme Court of New Hampshire suggest that the NHPUC could depart from the prudent investment rule to effect a "fair" sharing of prudent costs. Appeal of Conservation Law Foundation, 127 N.Y. 606, 507 A. 2d 652 (1986). And its suggestion even then was mere dicta and for that reason was not appealed by PSNH to this Court. It was not until the Bankruptcy Court issued the Confirmation Order and rejected RKR's objections did its suggestion become a holding in any case.

Thus, RKR submits that the Confirmation Order raises rather starkly the question of whether a utility has the right to recover its prudent investment in its operating plants when a state has represented (promised) that it would have

that right and the utility has invested billions of dollars in reliance on that promise, or whether a state can make such a promise and then, when a particular investment turns out badly, brake it.

That clearly is a very important question not just for the investors in PSNH but for the entire nation. If utilities can not rely on the promises of their regulators, they can not safely, and probably will not, invest in anything but the smallest and most conventional of technologies.

And if the Court does not accept this petition so that it can decide in this case that regulators must keep their promises, it may never get another chance. The utilities, and investors in utilities, will probably assume that they have no rights and act accordingly.

Of course, the Court does not need to consider this question at this time.

It could simply remand the matter to the First Circuit and let that court decide the merits. But it is clearly important that this Court settle this question for all the nation's utilities and as quickly as possible.

RKR therefore submits that it would be fully appropriate for the Court to exercise its power pursuant to its Rule 11 and consider the merits of RKR's appeal at this time.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 91-2039

IN RE: PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
Debtor,

MARTIN ROCHMAN, ET AL.,
Appellants,
v.
NORTHEAST UTILITIES SERVICE GROUP, ET AL.,
Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[Hon. Shane Devine, U.S. District Judge]

Before
Selya, Circuit Judge,
Bownes, Senior Circuit Judge,
and Cyr, Circuit Judge.

Robert C. Richards for appellants.
John B. Nolan with whom Allen B. Taylor, Lorenzo Mendizabel Theodore C. Morris, Day, Berry & Howard, Geoffrey M. Kalmus, Kramer, Levin, Nessen, Kamin & Frankel, and Howard J. Berman, and Whitman & Ransom were on the brief for appellees.

May 6, 1992

CYR, Circuit Judge. Three shareholders of Public Service Company of New Hampshire contend on appeal that the order confirming the Public Service Company of New Hampshire (hereinafter "PSNH") chapter 11 reorganization plan represents an abuse of discretion and violates their constitutional rights to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution. As the appeal from the district court judgement affirming the order of confirmation must be dismissed for mootness, we do not reach the merits of their appellate claims.

I

BACKGROUND[1]

PSNH filed its chapter 11 petition

[1]We summarize the background to the extended reorganization proceedings conducted in the bankruptcy court and invite reference to the opinions cited below for further detail.

in the United States Bankruptcy Court for the District of New Hampshire on January 28, 1988, seeking relief from the severe financial difficulties it encountered as the principal owner of the controversial nuclear power facility under construction at Seabrook, New Hampshire, since 1972. Due to the fact that the State of New Hampshire had banned Seabrook construction cost recoveries through PSNH rate increases until after the facility was brought on line, see N.H. Rev. Stat. Ann. § 378:30-a, PSNH had been forced to borrow the huge sums required to complete construction of the Seabrook facility. Meanwhile, construction delays, and problems in obtaining operating authority from the Nuclear Regulatory Commission, had escalated construction costs to $6.5 billion by January 1, 1990, $2.9 billion having been invested by PSNH which then owned a

35.6 percent share in Seabrook. Consequently, even though one Seabrook unit had been completed by October 1986, PSNH was forced to seek Chapter 11 protection prior to the completion of the second unit.

During November 1989, Northeast Utilities Service Company (hereinafter "NUSCO")[2] entered into an agreement with the Governor and Attorney General of New Hampshire for the establishment of an electricity rate structure which would allow PSNH to raise retail customer rates by 5.5% in each of seven successive years and enable PSNH to recoup some, but not all, of its Seabrook investment. On December 18, 1989, the New Hampshire Legislature empowered the New

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[2]NUSC is a wholly-owned subsidiary of Northeast Utility, a public utility holding company. The PSNH reorganization plan calls for the eventual merger of reorganized PSNH with NUSC and Northeast Utility.

Hampshire Public Utilities Commission ("NHPUC") "to determine whether implementation of the [rate] agreement would be consistent with the public good." N.H. Rev. Stat. Ann. § 362-c:3 (Supp. 1990). The NHPUC approved the rate agreement on July 20, 1990. Re Northeast Utilities/Public Service Company of New Hampshire, 114 PUR 4th 385 (N.H.P.U.C. 1990). The NHPUC order was affirmed by the Supreme Court of New Hampshire on April 24, 1991. Appeal of Richards, 134 N.H. 148, cert. denied, 112 S. Ct. 275 (1991).

Appellants objected to confirmation of the reorganization plan on the grounds that the approved rate agreement on which the reorganization was based would deprive PSNH of its prudent investment in Seabrook and the proposed reorganization therefore was not in the best interests of appellants, as equity

interest holders, since a litigated rate case allegedly would provide a greater return. The bankruptcy court conducted a six-day confirmation hearing, during which the proponents of the reorganization plan presented several expert witnesses, who were crossexamined by appellants. Appellant Robert Richards testified in opposition to confirmation.

On April 20, 1990, Bankruptcy Judge James A. Yacos entered the order of confirmation, accompanied by a comprehensive and well-reasoned memorandum opinion overruling appellants' objections. See In re Public Service Co., 114 B. R. 820 (Bankr. D.N.H. 1990). Judge Yacos found the reorganization plan "fair and equitable," see Bankruptcy Code § 1129(b)(1) & (3), 11 U.S.C. § 1129(b)(1) & (2), since the rate agreement was within the range of results reasonably expectable in a litigated

rate case. Judge Yacos further found that the class of common stock holders to which appellants belong would realize no greater recovery in a litigated rate case and, therefore, that the reorganization plan met the requirements of Bankruptcy Code § 1129(a)(7)(A)(ii).[3] Appellants filed a motion to stay execu-

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[3]Bankruptcy Code § 1129(a)(7)(A)(ii) provides -

(a) The court shall confirm a plan only if all of the following requirements are met:

. . . .

(7) With respect to each impaired class of claims or interests -

(A) each holder of a claim or interest of such class -

. . . .

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under Chapter 7 of this title on such date.

11 U.S.C. § 1129(a)(7).

tion of the confirmation order pending appeal, which was denied by the bankruptcy judge after hearing. See In re Public Service Co., 116 B.R. 347 (Bankr. D.N.H. 1990). No appeal was taken from the order denying the stay.

Appellants filed a notice of appeal from the order of confirmation with the United States District Court on May 18, 1990. Appellants' motion to stay execution of the confirmation order pending appeal was rejected by the district court on July 23, 1990. Once again, no appeal was taken. More than six months later, on February 8, 1991, appellants again moved for a stay in the district court, which was never acted on. During early August 1991, appellants requested a writ of mandamus to compel the district court to act on the merits of their appeal. The court of appeals dismissed the mandamus petition as moot.

On August 21, 1991, the district court affirmed the order of confirmation entered by the bankruptcy court on April 20, 1990.

II

DISCUSSION

Mootness in bankruptcy appellate proceedings, as elsewhere, is premised on jurisdictional and equitable considerations stemming from the impracticality of fashioning fair an effective judicial relief. See, e.g., In re Stadium Management Corp., 895 F. 2d 845, 847 (1st Cir. 1990); In re AOV Industries, Inc., 792 F. 2d 1140, 1147-48 (D.C. Cir. 1986), vacated in part on other grounds, 797 F.2d 1004 (D.C. Cir. 1986) (mootness involves "constitutional" and "equitable" aspects); In re Texaco, Inc., 92 B.R. 38, 45 (S.D.N.Y. 1988) (same). Jurisdictional concerns may arise from the constitutional limitations imposed

on the exercise of Article III judicial power in circumstances where no effective remedy can be provided,[4] or from a loss of jurisdiction over the res or the

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[4]Mills v. Green, 159 U.S. 651, 653 (1895) (mootness obtains when court cannot provide a remedy). See also In re Stadium Management, 895 F. 2d at 847; In re Continental Mortg. Investors, 578 F.2d 872, 877 (1st Cir. 1978) ("[a]n appeal is considered moot if it cannot affect the matter in issue or cannot grant effectual relief"); In re Cantwell, 639 F.2d 1050, 1053 (3d Cir. 1981) ("[g]enerally, an appeal will be dismissed as moot when events occur . . . which prevent the appellate court from granting any effective relief"); Miami Center Ltd. Partnership v. Bank of New York, 838 F.2d 1547, 1554 (11th Cir.), cert. denied, 488 U.S. 823 (1988) (case moot, as it had become "legally and practically impossible to unwind the confirmation of the plan or otherwise to restore the status quo" before confirmation); In re Information dialogues, Inc., 662 F.2d 475, 476 (8th Cir. 1981) ("mootness concern arises when . . . it may be impossible for a court to grant effective relief"); In re Combined Metals Reduction Co., 557 F. 2d 179, 189 (9th Cir. 1977) ("where an act or event sought to be enjoined has been performed or has occurred, an appeal from the denial of the injunction will be dismissed as moot").

parties, before or during the appeal, which renders the appellate court powerless to grant the requested relief.[5]

The equitable component to the mootness doctrine is rooted in the "court's discretion in matters of remedy and judicial administration" not to determine a case on its merits. In re AOV, 792 F.2d at 1147 (quoting Chamber of Commerce v. United States Dep't of Energy, 697 F.2d 289, 291 (D.C. Cir. 1980)); In re Texaco, 92 B.R. at 45 (same). In bankruptcy proceedings, the equitable component centers on the important public policy favoring orderly reorganization and settlement of debtor estates by "affording finality to the judgments of the bankruptcy court." Id. (quoting In re Revere Copper & Brass, Inc., 78 B.R. 17, 23 (S.D.N.Y. 1987));

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[5]See infra note 19.

In re Information Dialogues, Inc., 662 F. 2d 475, 477 ("mootness doctrine promotes an important policy of bankruptcy law -- that court-approved reorganizations be able to go forward in reliance on such approval unless a stay has been obtained"); Algeran, Inc. v. Advance Ross Corp., 759 F.2d 1421, 1424 (9th Cir. 1985) (mootness doctrine recognizes "particular need for finality in orders regarding stays in bankruptcy"); In re AOV, 792 F. 2d at 1149 (refusing to overturn plan, in part because of "virtues of finality").

Moreover, the equitable and jurisdictional considerations underlying the mootness doctrine are interactive, as "the finality rule limits the remedies a court can offer." In re Stadium Management, 895 F. 2d at 847-48. Although in bankruptcy cases these concerns most often coincide in the context of trans-

fers to good faith purchasers, see Bankruptcy Code § 363, we have acknowledged that the same principles "pervade the Bankruptcy Code," In re Stadium Management, 895 F. 2d at 848 (citing cases).

Appellants sought to stay the execution of the order of confirmation in the bankruptcy court, yet no attempt was made to appeal the denial of a stay.[6] Moreover, although stays were sought in the district court,[7] no appellate or

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[6]Bankruptcy Rule 8005 provides, in part:

> A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance.

Fed. R. Bankr. P. 8005.

[7]More than two months after the entry of the order of confirmation by the bankruptcy court, a motion for stay was filed with the district court, but the district court rejected the motion, apparently for failure to comply with Rule 11(b), District of New Hampshire

mandamus relief was ever requested from the court of appeals relating to a stay of the confirmation order. Consequently, implementation of the confirmed plan proceeded apace. See In re Roberts Farms, Inc. 652 F. 2d 793, 798 (9th Cir. 1981) (case moot, as appellants "failed and neglected diligently to pursue their available remedies to obtain a stay" of the confirmation order, letting transac-

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Local Rules, which provides as follows:

> (b) SEEKING CONCURRENCE IN MOTIONS
>
> The moving party shall certify to the court that he has made a good faith attempt to obtain concurrence in the relief sought. If moving party has obtained concurrence, he shall so state in the body of the motion so that the court may consider it without delay.

D.N.H. L.R. 11(b). Not until seven months later, on February 8, 1991, did appellants either attempt compliance with Local Rule 11 or otherwise renew their request for stay.

tions in reliance on the confirmed plan proceed which it would be inequitable, as well as impracticable, to undo).

In the meantime, the rate agreement had been approved by NHPUC on July 20, 1990, and the New Hampshire Supreme Court affirmed the NHPUC action on April 24, 1991, fulfilling the final unmet requirement for implementation of the reorganization plan. See 11 U.S.C. § 1129(A) (6). [8] At this time, by its own terms the reorganization plan was to

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[8]Bankruptcy Code § 1129(a)(6) provides that -

> The court shall confirm a plan only if all of the following requirements are met:
>
> . . . .
>
> (6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

Bankruptcy Code § 1129(a)(6), 11 U.S.C. § 1129(A)(6).

go into effect within thirty days. Nevertheless, appellants took no steps either to request a prompt ruling on their motion for stay before the district court, or to obtain a stay-related writ of mandamus from, or file an interlocutory appeal with, the court of appeals. See Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146 (1992) (28 U.S.C. § 1292 confers discretionary jurisdiction on court of appeals to entertain appeal from interlocutory district court order entered in bankruptcy appeal.)[9] Instead, appellants

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[9]The failure of the district court to take prompt action on the motion for stay was tantamount to a denial of the stay. Cf. United States v. Lynd, 301 F. 2d 818, 822 (5th Cir.), cert. denied, 371 U.S. 893 (1962) (where district court's failure to rule on request for injunctive relief was determined reviewable by court of appeals since refusal to act had the practical effect of a denial of relief). In addition, appellants were entitled to a stay pending appeal upon posting a supersedeas bond. See Fed.R. Civ. P. 62(d); Fed. R. Bankr.

allowed the reorganization to go into effect on May 17, 1991. Although appellants, on August 8, 1991, requested a writ of mandamus to compel the district court to decide the merits of their appeal, the reorganization plan had gone into effect almost three months earlier, and we denied mandamus relief on grounds of mootness. In sum, whether through oversight or "procedural ineptitude," see In re Roberts Farms, 652 F. 2ds at 795 ("procedural ineptitude" in seeking stay no excuse); In re Hamady Bros. Food Markets, 110 B.R. 815, 818 (E.D. Mich.

P. 7001(5), (7) & 7062; see also Fed. R. Civ. P. 62(g). While we recognize the practical difficulties in posting a supersedeas bond in a matter of this magnitude, appellants did not propose a supersedeas bond in any amount. In any event, as explained below, appellants "should not have sat . . . by while this case drifted along a routine, unexpedited course." Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 841 F. 2d 92, 95 (4th Cir. 1988).

1990) (same), appellants failed to "pursue with diligence all available remedies to obtain a stay of execution of the objectionable order," In re Roberts Farms 652 F. 2d at 798 (emphasis added).

The failure to obtain a stay is not sufficient ground for a finding of mootness. See, e.g., In re AOV, 792 F. 2d at 1147; In re Block Shim Development Company-Irving, 939 F. 2d 289, 291 (5th Cir. 1991); In re Texaco, 92 B.R. at 44. Nevertheless, in the absence of a stay, interested parties are free to implement the confirmed reorganization plan according to its terms, and the consequent circumstances may moot the matter in dispute.[10] In these circumstances, the

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[10]As observed by one commentator--

> [a] party who desires to appeal is not obliged to seek a stay of the judgment pending appeal. The only consequence of failing to obtain a stay is that the prevailing party may treat the judgment of the bank-

reviewing court must "scrutinize each individual claim, testing the feasibility of granting relief against the potential impact on the reorganization scheme as a whole." In re AOV, 792 F. 2d at 1148; Central States, 841 F. 2d at 96 ("court should reach a determination upon close consideration of the relief sought in light of the facts of the particular case"). The case is moot if the requested relief would be either

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> ruptcy court as final, notwithstanding that an appeal is pending. . . . A stay pending appeal, usually in the form of an injunction, is necessary only if what may be done under the judgment is beyond the power of the appellate court to undo by its judgment. If the irreversible action is taken pending the appeal, the appeal will be dismissed as moot.

Lawrence D. King, 9 Collier on Bankruptcy ¶ 80005.04 at 8005-6 (15th ed. 1992).

inequitable[11] or impracticable[12] in light of the change in circumstances.

The absence of a stay allowed performance under the PSNH reorganization plan to proceed to a point well beyond

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[11] See In re Roberts Farms, 652 F. 2d at 798 (absent a stay "such a comprehensive change of circumstances . . . [may] occur as to render it inequitable for th[e] court to consider the merits of the appeal"); In re Crystal Oil Co., 854 F. 2d 79, 82 (5th Cir. 1988) (given failure to seek a stay and the resulting "comprehensive change of circumstances," relief would be "plainly inequitable"); In re Information Dialogues, 662 F. 2d at 477 (same).

[12] See In re Kahihikolo, 807 F. 2d 1540, 1542 (11th Cir. 1987) ("in the absence of a stay, action of a character which cannot be reversed by the court of appeals may be taken in reliance on the lower court's decree [a]s a result [of which] the court of appeals may become powerless to grant the relief requested by the appellant") (quoting American Grain Assoc. v. Lee-Vac, Ltd., 630 F. 2d 245, 247 (5th Cir. 1980)); see also In re Stadium Management, 895 F. 2d at 847 (absent a stay, appeal must be dismissed as moot when court of appeals cannot fashion a remedy).

any practicable appellate annulment.[13] The reorganization went into effect on May 16, 1991, when PSNH became committed to implement the numerous complex arrangements required to enable its restructuring and to finance the distributions contemplated under the confirmed plan.[14] In furtherance of these arrangements, all but one mortgage and

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[13]Of course, "substantial consummation" per se is insufficient to moot an appeal from an order of confirmation, In re AOV, 792 F. 2d at 1148; Central States, 841 F. 2d at 96; In re King Resources Co., 651 F. 2d 1326, 1332 (10th Cir. 1980), but it raises a "strong presumption" that an appellate court will not be able to fashion an equitable and effective remedy, In re AOV, 792 F. 2d at 1149; In re Texaco, 92 B.R. at 46.

[14]These financial arrangements included issuance of PSNH first mortgage bonds aggregating $342,5000,000 in an underwritten public offering; issuance of 5,000,000 shares of PSNH preferred stock at a par value of $25 per share; and loans from various banking institutions amounting to over $1 billion, guaranteed by the New Hampshire Industrial Development Authority.

all indentures, securities and associated agreements and encumbrances relating to the PSNH prepetition indebtedness were released and the lone remaining mortgage encumbrance was substantially modified. Furthermore, on the effective date of the reorganization plan, all preexisting equity interests in PSNH were exchanged for replacement securities, including approximately 32,000,000 shares of PSNH common stock, notes aggregating $205,000,000, and more than 8,000,000 certificates evidencing contingent rights to acquire, upon PSNH's eventual merger with NUSC and Northeast Utility, see supra note 2, warrants to purchase common stock in the emergent entity.

Approximately $1,530,000,000 and 8,000,000 newly-issued contingent warrant certificates were delivered to the distributing agent on May 16, 1991, and

distributions commenced the next day. Consequently, in accordance with the terms of the confirmed plan, more than 100,000 individuals and entities received, or became entitled to receive, various forms of securities in full satisfaction of their PSNH claims and interests. The new securities issued to generate the monies needed to fund distributions to creditors have been publicly traded since May 1991. Thus, the innumerable transfers legitimately effected to and among innocent third parties in the absence of a stay, and in reliance on the order of confirmation and the rate agreement challenged on appeal, see 11 U.S.C. § 1129(a)(6), plainly represent so substantial a consummation of the reorganization plan as to render the requested appellate relief impracticable.

Moreover, a pair of related consid-

erations reinforces the strong presumption disfavoring an appellate remedy which would undermine the entire reorganization.[15] First, an appellate reversal of the substantially consummated reorganization plan in the present case would "creat[e] . . . a nightmarish situation for the bankruptcy court on remand," In re Texaco, 92 B.R. at 50;

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[15] See e.g., In re Robert Farms, 652 F. 2d at 797 (requested relief "would knock the props out from under the authorization for every transaction that has taken place"); In re AOV, 792 F. 2d at 1149 (finding "moot" all claims except those which would "not affect the reemergence of the debtor as a revitalized entity"); Central States, 841 F. 2d at 96 (requested relief would work "a complete reversal of the plan of reorganization"); In re Block Shim, 939 F. 2d at 291 (claims moot where reversal "would not only jeopardize, but eviscerate, the plan and thwart [debtor's] attempts to reorganize"); Miami Center Ltd. Partnership, 838 F.2d at 81-82 (requested relief would "strike at reorganization plan as a whole"); In re Texaco, 92 B.R. at 91 (case moot where "relief sought goes to the very core of the Reorganization Plan and cannot be severed").

see also In re Roberts Farms, 652 F. 2d at 797 (requested relief "would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court"), and make reconstructive relief extremely improbable. Second, the reversal of a reorganization plan substantially consummated in the absence of a stay of the order of confirmation would run counter to the important policy favoring finality in bankruptcy proceedings. See id. at 798.

The PSNH reorganization entailed financing arrangements involving more than $1.5 billion and 100,000 sources, none of which "stand independently and apart from the [reorganization] plan . . .," see id. at 797, and all of which were undertaken in reliance on the con-

firmed plan.[16] Appellate reversal of an order confirming a substantially consummated reorganization plan constructed within the framework of so many "intricate and involved transactions [] . . . solely [founded on] the order confirming the plan . . .," id. (empha-

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[16]The Prospectus issued in connection with the offering of $342,5000,000 in PSNH first mortgage bonds stated: the "Rate Agreement provides the financial basis for the Plan." The Prospectus described "an amendment or modification of any governmental approval required to give effect to the Rate Agreement . . . [,] which in the Banks' opinion may have a material adverse effect on the Company," as an "event of default" under the terms of the Credit Agreements [totalling $652,000,0000 with the various lenders. Additionally, the prospectus states that any "default under the Credit Agreements which results in the taking of any action by or on behalf of the banks to foreclose or otherwise realize against the trust estate for the bonds" would be an event of default under the indenture securing the mortgage bonds. Finally, at oral argument appellees represented that there is no contingency plan relating to a revocation of the order confirming the reorganization plan. Appellants do not suggest otherwise.

sis in original), would present a daunting assignment for the Humpty Dumpty repairman. See In re Texaco, 92 B.R. at 46 ("in practical terms if nothing else, a virtually impossible task . . ."). Moreover, unraveling the substantially consummated PSNH reorganization plan would work incalculable inequity to many thousands of innocent third parties who have extended credit, settled claims, relinquished collateral and transferred or acquired property in legitimate reliance on the unstayed order of confirmation. See, e.g., In re Texaco, 92 B.R. at 45 (when "hundreds or even thousands of good-faith transactions by innocent parties" may have been undertaken in reliance on the confirmed reorganization plan, "it would be manifestly unjust to reverse on appeal"); see also supra note 15.

Appellants argue, however, that it

may be practicable to fashion less than sweeping relief without adversely affecting innocent third parties.[17] Appellants assume, of course, that their claimed constitutional entitlement to recover all prudent investment in Seabrook will not only prevail but result in a more profitable PSNH than would emerge under the confirmed reorganization plan. We resist their belated speculation, for several reasons.

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[17]For example, appellants suggest that the court could simply "require" Northeast Utilities "to convert its common stock in Reorganized PSNH into a preferred stock or debt in an amount equal to what it paid for the Reorganized Common and then spin the company off to the [shareholders of prepetition PSNH]." According to appellants, their proposed PSNH stock conversion and spin-off would benefit the holders of impaired equity interests in PSNH without adversely affecting equity interests in the reorganized company. We would note, however, that the confirmed reorganization plan prohibits PSNH from issuing additional preferred stock without the consent of holders of a majority of the outstanding PSNH preferred stock.

First, at the very least, setting aside the confirmed reorganization plan would adversely affect investors in the reorganized PSNH who acted in legitimate reliance on the order of confirmation in the absence of a stay. See e.g., Central States, 841 F.2d 92 (modification of the plan would affect rights of investors in reorganized company); Valley Nat'l Bank v. Trustee for Westgate-California Corp., 609 F.2d 1274 (9th Cir. 1979), cert. denied, 444 U.S. 1015 (1980) (same); In re Texaco, 92 B.R. 38 (same). Second, appellants' contention that all concerned would be better off if PSNH were to litigate a rate case has been roundly rejected at every turn, in every venue.[18] Third,

[18]The concededly uncertain enterprise of forecasting an optimal, practicable rate structure for PSNH has been extensively examined and invariably resolved adversely to appellants within all three venues of New Hampshire gov-

were the court to credit appellants' reconstructive scenario, we would be rearranging the stage on which the financial calculations of nonparty investors in the reorganized company were set and their investments reliantly made. See Block Shim, 939 F. 2d at 291 (appeal of confirmation order moot where reversal would adversely affect rights of third parties not before the court); In re AOV, 792 F.2d at 1149 (only appellate claims not considered moot are those not having adverse effect on interests of parties not before the court); Central

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ernment, the financial and securities markets, and by the bankruptcy court following a referendum among all PSNH creditors and interest holders. See 11 U.S.C. § 1129 (a) (7). We need not reach the merits of appellants' claims on appeal in order to observe that their roundly-rejected contentions may not be assumed as the major premise for their argument that holders of equity interests, as well as creditors, would be well served if required to take their chances on the outcome of a litigated rate case.

States, 841 F. 2d at 96 (court may not adversely affect parties not before it); In re Texaco, 92 B.R. at 51 (since appellants failed to obtain stay and the positions of "so many third parties [are] now radically changed in reliance on the Confirmation Order, the equities cut decisively against this appeal"). Finally, we would be without jurisdiction to effect the recommended relief in any event. Central States, 841 F. 2d at 96 (court "without jurisdiction to impose substantial adverse consequences upon those absent"); Valley Nat'l Bank, 609 F. 2d at 1283 (mootness obtains if court lacks jurisdiction over "vast majority of persons" affected by merger).[19]

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[19]The present appeal involves jurisdictional considerations closely analogous to appeals determined moot due to loss of jurisdiction over the res, or the parties, occasioned by their removal or transfer from the jurisdiction in the

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CONCLUSION

Overriding jurisdictional, equitable and practical considerations counsel dismissal of the present appeal on the ground of mootness, as the absence of a stay pending the appeal of the order confirming the reorganization plan permitted its implementation to so substantial an extent as to leave the court powerless to grant fair and effective relief.

The appeal is dismissed; costs to

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absence of a stay or injunctive relief pending appeal. See, e.g., United States v. One Lear Jet Aircraft, 836 F. 2d 1571, 1574 (11th Cir.), cert denied, 487 U.S. 1204 (1988) (failure to obtain stay of forfeiture order rendered case moot upon removal of subject property from jurisdiction); L. B. Harvey Marine, Inc. v. M/V "River Arc", 712 F. 2d 458 (11th Cir. 1983) (case became moot when vessel left jurisdiction in absence of stay of order denying arrest); Alyeska Pipeline Service Co. v. The Vessel Bay Ridge, 703 F.2d 381 (9th Cir. 1983), cert. dismissed, 467 U.S. 1247 (1984) (same).

appellees.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-2039

IN RE: PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE,
Debtor,

MARTIN ROCHMAN, ET AL.,
Appellants,
v.
NORTHEAST UTILITIES SERVICE COMPANY,
ET AL.,
Appellees.

Before
Selya, Circuit Judge,
Cyr, Circuit Judge,
and Bownes, Senior Circuit Judge.

ORDER OF COURT
Entered: May 27, 1992

Upon consideration of appellants' petition for rehearing,

It is ordered that said petition is denied.

By the Court:
FRANCIS P. SCIGLIANO
Clerk

[cc: Messrs. Richards, Nolan]

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEW HAMPSHIRE

In re: Public Service Company
of New Hampshire

Martin Rochman;
Edward Kaufman;
Robert Richards,
Appellants

v. Civil No. 90-272-D

Northeast Utilities
Service Group;
Official Committee of Equity
Security Holders of Public
Service Company of New Hampshire,
Appellees

MEMORANDUM OPINION

In this bankruptcy appeal, certain common stock holders of Debtor Public Service Company of New Hampshire ("PSNH") challenge confirmation of the Plan of Reorganization ("Plan").

1. Background

PSNH is the largest electric utility

company in New Hampshire. In 1974 it commenced the construction of a two-unit (i.e., two reactors) nuclear power plant in Seabrook, New Hampshire. The projected cost of completion was approximately $1.3 billion, with a completion date of November 1979 for Unit I.

PSNH was the lead utility with respect to the construction of Seabrook, initially holding fifty percent ownership in the project. On May 7, 1979, the New Hampshire Legislature enacted a statute which prohibited any recovery in electric rates for construction costs of a power plant until such plant was actually producing electric power. New Hampshire Revised Statutes Annotated ("RSA") 378:30-a.[1]

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[1]RSA 378:30-a states:

> Public utility rates or charges shall not in any manner be based on the cost of construction work in progress. At no time shall any

The effect of this legislation was to substantially increase the cost of completion of Seabrook. Funds would thereafter have to come from financial institutions at interest, rather than from the electric rate payers. Undaunted by such adversity, PSNH and the other joint owners of Seabrook decided to proceed with its construction.

Eventually, Unit I only was completed in October 1986. Other events caused the cost of Seabrook construction (including carrying costs and interest) to

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rates or charges be based upon any costs associated with construction work if said construction work is not completed. All costs of construction work in progress, including, but not limited to, any costs associated with constructing, owning, maintaining or financing construction work in progress, shall not be included in a utility's rate base nor be allowed as an expense for rate making purposes until, and not before, said construction project is actually providing service to consumers.

escalate to $6.5 billion as of January 1, 1990. PSNH, whose ownership interest in the interim had been reduced to 35.6 percent, had invested approximately $2.9 billion in the Seabrook project.

On January 28, 1988, PSNH filed a petition for reorganization pursuant to chapter 11 of the Bankruptcy Code. 11 U.S.C. §§ 1101-1146. This unusual action on the part of a utility was triggered by the previously described escalating costs of construction at Seabrook.

On November 22, 1989, Northeast Utilities Service Company ("NUSCO")[2] and the Governor and Attorney General of New Hampshire entered into an agreement ("the Rate Agreement") whereby changes would be made in the method of establishment of electric rates by the New Hampshire Pub-

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[2]NUSCO is a subsidiary of Northeast Utilities ("NU"), a large Connecticut-based electric utility company.

lic Utilities Commission ("PUC"). On December 18, 1989, a special session of the New Hampshire Legislature enacted legislation authorizing the PUC "to determine whether the implementation of the [Rate] [A]greement would be consistent with public good." RSA 362-C:3 (Supp. 1990).[3]

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[3]RSA 362-C:3 (Supp. 1990) provides:

> The commission is authorized, after hearing, in one or more proceedings to be initiated and completed during the pendency of the Public Service Company of New Hampshire bankruptcy, to determine whether the implementation of the agreement would be consistent with the public good. If the commission so finds, it shall, notwithstanding any other provision of law, establish and place into effect the levels of rates, fares, or charges and the fuel and purchased power adjustment clause to be maintained for Public Service Company of New Hampshire, or its successor, in accordance with, and during the times periods set forth in, the agreement; then the commission shall initiate such other proceedings, hold such other hearings and take such other action as may be necessary to implement the provisions of the agree-

On January 2, 1990, the parties interested in finalization of the bankruptcy proceedings ("the Proponents") filed the Plan, together with their Third Amended Disclosure Statement. Bankr. Document No. 2998. On January 3, 1990, the bankruptcy court approved the Disclosure Statement pursuant to 11 U.S.C. §1125 (b) and authorized the Proponents to solicit acceptance of the Plan by the various classes of creditors and equity security holders. The court also set April 1990 as the time for the holding of confirmation hearings.

Appellants Martin Rochman, Edward Kaufman, and Robert C. Richards ("RKR") are owners of PSNH common stock. Prior to commencement of the confirmation hearings, RKR filed objections to such confirmation. The thrust of their objec-

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ment.

tions was that the common stock holders of PSNH would likely recover a greater return on their investment if a litigated rate case were held before the PUC.

Six days of confirmation hearings commenced on April 4, 1990. The proponents presented a number of expert witnesses, who testified as utility operations, accounting methods, and ratemaking case procedures. Apart from testimony by Mr. Richards, the appellants chose to rely solely on cross-examination of such witnesses.

On April 20, 1990, the bankruptcy court entered its "Order Confirming Third Amended Plan of Reorganization", Bankr. Document No. 3617, accompanying same with its "General Findings of Fact and Conclusions of Law Re Plan Confirmation Issues", Bankr. Document No. 3618. These documents were followed by the court's "Memorandum Opinion on 'RKR' Objections

Re Confirmation of Plan of Reorganization". Bankr. Document No. 3742. The effect of such rulings was the rejection of the claims of RKR. This appeal followed.

2. Discussion

The Plan provides for NUSCO to acquire PSNH for $2.3 billion. The rate agreement therein calls for annual retail electricity rate increases of 5.5 percent for a period of seven years, commencing January 1, 1990.

The Plan was the result of lengthy, arms-length, and difficult bargaining among various utility companies, PSNH, and the State of New Hampshire. Ironically, only the "give-up" of substantial funds by other classes of creditors provides any funds for distribution to the common stock holders of PSNH.

Appellants' theory is that a more substantial rate increase could result

from a contested rate hearing before PUC. Based on rejection of Generally Accepted Accounting Principles ("GAAP"),[4] and unaccepted anywhere, this argument also overlooks the dangers of "municipalization".[5] As a "fall-back", RKR relies on

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[4]The Financial Accounting Standards Board ("FASB") adopted FASB Standard 71 to specify the accounting principles to be used by regulatory enterprises such as utilities. Thereunder, an Allowance for Funds Used During Construction ("AFUDC") is capitalized, together with other construction costs, including the costs of debt. PSNH originally operated pursuant to FASB 71 until it was required to "write down" its investment.

Another standard, FASB 92, requires that utilities recover their investments over a period not to exceed ten years. The theories advanced by the appellants would require such recovery to extend for a considerably longer period of time.

[5]"Municipalization" occurs when a municipality leaves its electric supplier to generate its own or to purchase power from another source. In 1984, the City of Concord and Town of Exeter joined forces and withdrew from the PSNH electrical supply system. The City of Nashua, second-largest in New Hampshire, was seriously contemplating municipalization at the commencement of and early into the

the unlikely possibility of a state take-over of PSNH.[6]

a. The Relevant Evidence

PSNH "wrote down" approximately $1 billion of its $2.9 billion investment in Seabrook. T. I-A, 109.[7] Robert M. Busch, chief financial expert of NUSCO, testified that this action was appropriate, that other utilities had acted simi-

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bankruptcy proceedings.

[6]On May 11, 1989, the New Hampshire Legislature created the "New Hampshire Energy Authority", designed, if necessary, to take over PSNH. RSA 362-B (Supp. 1990). The funding of this authority was to be met by the issuance of revenue bonds. Id. at § 14.

A change in the tax laws renders such revenue bonds taxable. In any event, the Legislature repealed the statute effective January 30, 1991. New Hampshire Laws of 1990, chap. 70:5 I.

[7]The designation "T." followed by a Roman numeral refers to a volume of the transcript of the confirmation hearings. The Arabic numerals indicate the pages of such transcript volume.

larly, and that his company had done so two years previously with respect to its share of Seabrook. Id., 97-101.

As of the time of such "write-down", the PSNH rate per kilowatt hour ("KW") was 8 cents. T. I-A, 111. Recovery of the entire investment would have required an increase of close to 90 percent, or a rate of 15 to 16 cents per KW. Id. 111-14. Such increase would have caused many customers of PSNH to leave the system. Moreover, as concerns the "Bower-Rohr" report,[8] the witness testified that a one-time rate increase of 31 percent,

[8]Prepared by economic consultants located in Hanover, New Hampshire, the Bower-Rohr report is discussed at page 210 of the Disclosure Statement. Bankr. Document No. 2998. Appellants made much of its existence, but did not seek to have any of its authors testify as witnesses. the comptroller of PSNH testified that the realities, competitive and political, would have made the Bower-Rohr suggestion of a one-time 31 percent increase, followed by annual inflationary increases, a course that would not be feasible. T. IV, 118-23.

coupled with inflationary increases thereafter, would not be affordable. Id., 122-23.

Bruce W. Wiggett, comptroller of PSNH, testified as to various analyses prepared by PSNH, commencing in 1984, which demonstrated that one-time rate increases necessary to recover the cost of Seabrook would be as high as 130 percent. T. IV, 7-8. PSNH recognized, however, that given the competition, and the regulatory and political environment it worked in, such increases could not be requested. Id., 9.

Another analysis, in 1989, resulted in a suggested increase of 89 percent, which PSNH believed not attainable. T. IV, 12. In August 1987, PSNH did request a 15 percent rate increase from PUC. Id., 12-14. That effort was unsuccessful. Petition of Public Service Company of New Hampshire, 130 N.H. 265, 539 A. 2d 263

(1988), appeal dismissed, 488 U.S. 1035 (1989).[9]

It was in light of the foregoing circumstances, stated Wiggett, that PSNH realized it could not comply with recognized utility accounting standards, supra, note 4, and it therefore "wrote down" the value of Seabrook to $1.8 billion. T. IV,17-24. PSNH did not, however, change the Form 1 filed with regulatory agencies, as it sought to preserve value in the event of such future events as a marked rise in oil prices. Id., 24-28. As of his testimony on April 11, 1990, Wiggett believed a further "write-down" of $260 million might be required in the financial statement for the year

[9]The requested rate increase of 15 percent necessarily involved a challenge to the constitutionality of the "anti-CWIP" law, RSA 378:20-a, supra, note 1. PUC accordingly transferred the entire issue to the New Hampshire Supreme Court, which upheld the constitutionality of that statute.

ending 1989. Id., 29-30.

Andrew B. Herf, a partner in the Accounting & Auditing Group of Arthur Andersen & Company, described in detail the accounting foundation for the "write-down". T. IV, 146-69. His conclusion was that the final reduced value of $1.8 billion was a ceiling beyond which PSNH could not move. Id. at 169.

Herf also testified that the "host of factors" involved in any rate case made it "virtually impossible" to predict the outcome of such case. Id. at 190.

A number of witnesses testified with respect to the "auction" of PSNH. Robert M. Spann, senior consultant for Charles River Associates, lecturer in economics at George Washington University, and a specialist in regulatory economics and finance, testified that if the value of PSNH was greater than that offered by NUSCO, some other entity would have made

such offer. T. III, 115, 23. Spann also testified that if the argument of RKR was adopted, the result would be electric rates which were too high to be acceptable to most current customers of PSNH. Id. 72-94.

John F. Curley, managing director of Merchant Banking Department of Morgan Stanley, was retained to advise NUSCO on the possibility of purchasing PSNH. T. III, 196-97. He testified that the Plan of NUSCO offered the highest value available at the conclusion of the well-publicized auction, which had interested four substantial regional utility companies. Id. 227-30. Intimately involved in the financing of the Plan, Curley was optimistic that such financing would be successful. Id. 199-215.

Wilbur J. Ross, Jr., of Rothschild, Inc., has been the financial advisor to parties in interest in many major bank-

ruptcy reorganizations. T. III, 283-84. Retained by the Equity Committee in this reorganization, he detailed the difficulties encountered in negotiating the Plan. Id., 284-90. A key factor of Plan success was concessions made by preferred stockholders of $135 million of pre-petition accrued dividends and $109 million of post-petition dividends to the common stock holders. Id. at 285. Before the Plan was finalized, the Equity Committee seriously considered, but ultimately rejected, both a litigated rate case and a state takeover of PSNH. Id. 285-90.

Peter Fox-Penner, vice president of Charles River Associates, specializes in electric economics and electric utility matters. t. I-A, 160-62. He testified as to "price paths", i.e., the sequence of prices over time, which includes consistency in price/revenue planning to achieve desired revenue results. Id.,

166-67. A price in excess of such projections results in a decrease in sales and/or a loss of customers. Id. 168-71. A comparison chart created by this witness showed the difference between pricing under the Plan as contrasted with the theory of RKR. NUSCO Exhibit 8, id., 174-79. Initially, this demonstrates the prices to be charged under the Plan to exceed the prices paid by 80 percent to 90 percent of New England electricity customers. Id. While some loss of customers is anticipated, the witness opined that the prices would not be so high as to prompt new attempts at municipalization. Id. With the prices suggested by RKR, there would be a much greater loss of customers to municipalization or cogeneration. Id.

With respect to the possibility of a "phase-in" of rates, witness Robert Spann testified that this approach might pres-

ent lower initial rates, but higher rates at a later date. T. III, 168-88. While a phase-in would have both benefits and costs, such method of calculation has never provided a "free lunch". Id. at 188.

Appellant Robert C. Richards was an attorney for Long Island Lighting Company ("LILCO") from 1971 to 1984. T.V., 41. From 1984 to 1989 he was a member of the Strategic Planning Department and thereafter the Financial Planning Department at LILCO. Id. 41-42. His understanding of New Hampshire law is that PSNH "has a right to recover its prudent investment in its facilities and, therefore, it must be allowed to recover its investments if at all possible." Id. at 43. If the one-time increase of Bower-Rohr, supra, note 8, followed by annual increases for inflation, could not be adopted, then NUSCO Plan rates at 7 years, followed by

annual inflationary increases until the plant investment was recovered, would maximize the value of PSNH. Id. 49-52.

Richards felt that the Plan imposes no "real burden" on the ratepayers, although the common stock holders have lost most of their investments. Id. 53.

At least one of the formulas suggested by Richards, which would lead to a phase-in over the life of the asset, would be in violation of FASB 92. Id. at 73. Another formula assumes that rates of 16 cents per KW would be feasible. Id. at 112, 113.

In sum, Richards felt that the anti-CWIP law, RSA 378:30-A, supra, note 1, drove up costs, and equates with a "bet" that Seabrook would not run. Id. 202-05. As the "bet" was won by the investors, they should have the right to recover the full value of their investments. Id. 205-06.

The proposal advanced by the appellants assumes $2.5 billion of debt, and a 31 percent increases plus 4 percent annual increases thereafter. T. III, 85-87. this amount of debt would be 70 percent of the $3.6 billion assumed by the proposal, and would result in a debt ratio much higher than any publicly regulated utility, and in fact exceeded by only 4.7 percent of all publicly held companies. Id. 88. The issuance of $2.5 billion of debt would cause fixed interest charges to be 50 percent higher, and if backed only by Seabrook, the interest charges would be much higher. Id. 89. At such "razor-thin" margin, PSNH, with such happening as an extended outage, would be right back in the bankruptcy court. Id., 90.[10]

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[10]As of August 19, 1991, Seabrook has been in operation for one full year. Some 9 outages have occurred in that period, although none of them have been

b. Relevant Law

In determining whether a proposed reorganization compromise is "fair and equitable", a bankruptcy court must assess the "probabilities of ultimate success should the claim be litigated." Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Andersen, 390 U. s. 414, 424 (1968). This requires formulation of an independent judgement "of the complexity, expense and likely duration of such litigation," as well as any "other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." Id.; see also In the Matter of Boston & Providence R.R. Co., 673 F. 2d 11, 12 (1st Cir. 1982); In re Continental Investment Co., 637 F. 2d 8, 11 (1st Cir. 1980). Independent review of the well-

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of major dimension.

crafted opinion (of 54 pages), the 1,686 pages of transcript, and the exhibits, briefs, and other relevant documents satisfies this court that the bankruptcy judge fully complied with the above mandate.

Appellants misplace reliance on what they perceive to be an "etched-in-stone" rate-making analysis grounded on a rate base which includes only property "used and useful" in the generation of electricity in which the utility's investment was "prudent" at the time made. Appeal of Conservation Law Foundation, 127 N.H.606, 637-38, 507 A.2d 652, 673-74 (1986). Not only may legislators give specific instructions to their utility commissions, Duquesne Light Co. v. Barasch, 488 U. S. 299, 313 (1989), but the prudent investment rule is not a constitutional standard. Id. at 315.

As previously indicated, in the

consideration of the complex administrative and judicial proceedings attendant on Seabrook, New Hampshire's highest court has upheld the constitutionality of the "anti-CWIP" law, RSA 378:30-a, supra, note 1. Petition of Public Service Co. of New Hampshire, supra. [11] And, in events subsequent to the conclusion of the confirmation hearings herein, the New Hampshire Court has upheld the Plan here at issue. Appeal of Richards, ___ N.H.___, 590 A. 2d 586 (1991).[12]

In short, the preponderance of the evidence presented at the confirmation

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[11]Significantly, the Supreme Court of the United States dismissed the appeal of this ruling some twelve days after it had rendered its decision in Duquesne Light Co. v. Barasch, supra.

[12]In Appeal of Richards, the PUC, pursuant to the mandate of RSA 362-C (Supp. 1990), supra, note 3, had approved the Plan which is at issue in these proceedings. The New Hampshire Court ruled that RKR lacked standing to challenge this finding, and also upheld the ruling of the PUC.

hearing demonstrates that a litigated rate case, with its length, complexity, and cost, would probably not result in a rate award greater than that presented by the Plan. Moreover, the record further demonstrates that the accounting and economic changes advocated by RKR would not likely be adopted.

3. Conclusion

Careful review of the record presented satisfies the court that there was no error in the findings of the bankruptcy judge. De novo review of the relevant legal authorities demonstrates that he correctly applied the law.

Accordingly, the appeal herein must be and it is herewith denied. The court finds that there is no merit in any argument or suggestion that further stay pending appeal or interference with the bankruptcy proceedings now be had, and directs the clerk to expeditiously enter

judgement affirming the findings and rulings of the bankruptcy court in this reorganization.

SO ORDERED.

SHANE DEVINE
CHIEF JUDGE
UNITED STATES DISTRICT COURT

August 21, 1991

cc: Robert C. Richards, Esq.
John B. Nolan, Esq.
Richard Levi, Esq.
Geoffrey Kalmus, Esq.
Howard Berman, Esq.
George J. Wade, Esq.
Robert Drain, Esq.
J. Michael Deasy, Esq.
Harold T. Judd, Esq.
Thomas D. Rath, Esq.
George A. Vannah, Clerk -BK

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

In re: Public Service Company
of New Hampshire, et al

v.

Civil Action No. 90-272-D

Northeast Utilities Service
Group, et al

J U D G M E N T

In accordance with Chief Judge Shane Devine's order of August 21, 1991, the findings and rulings of he bankruptcy court are AFFIRMED and judgment is hereby entered.

By the Court,

Catherine M. Dube
Deputy Clerk

August 22, 1991

cc: Robert C. Richards, Esq.
John B. Nolan, Esq.
Richard Levi, Esq.
Geoffrey Kalmus, Esq.
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Harold T. Judd, Esq.
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George A. Vannah, Clerk -BK

APPENDIX E

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, BK NO. 88-43
CHAPTER 11

Debtor

MEMORANDUM OPINION ON "RKR" OBJECTIONS RE CONFIRMATION OF PLAN OF REORGANIZATION

This Court by its "Order Confirming Third Amended Joint Plan of Reorganization" entered April 20, 1990 confirmed a $2.3 billion plan of reorganization in this case proposed by Northeast Utilities Service Company ("NUSCO"), Public Service Company of New Hampshire ("PSNH"), the Official Committee of Unsecured Creditors, the Official Committee of Equity Security Holders, Citicorp, Consolidated Utilities & Communications, Inc. and Shearson Lehman Hutton, Inc., (collectively, the "Proponents"), which plan had

been filed by the Proponents on January 2, 1990 and was heard in a series of confirmation hearings spanning the period of April 4, 1990 to April 13, 1990.

The Confirmation Order was supported by this Court's "General Findings of Fact and Conclusions of Law Re Plan Confirmation Issues" entered also on April 20, 1990 together with various supporting Memorandum Opinions dealing with various objections to confirmation and objections to claims. The Court in dealing with the various objections in those pleadings effectively disallowed some $700 million in claims in this estate that were intertwined with objections to confirmation; dealt with a myriad of other objections including objections to the disclosure and voting procedures with acceptance of the plan of reorganization; and also denied the objections of three common stockholders, Martin Rochman, Edward

Kaufman, and Robert Richards ("RKR") contending that a Rate Agreement compromise with the State of New Hampshire embodied in the plan of reorganization was not fair and equitable and that the "best interests" requirement of Sec. 1129(a)(7) of the Bankruptcy Code was violated because the debtor could obtain greater value flowing down to the common stockholders by a litigated rate case with the State of New Hampshire.

The Court in dealing with the RKR objections made certain key findings on April 20, 1990, but due to the press of time in acting upon the pending plan of reorganization, deferred for further entry the setting forth of amplified findings and conclusions in support of the denial of these objections. This opinion therefore provides those amplified findings and conclusions in support of the Confirming Order. The RKR objec-

tors have been granted an appropriate extension of time, to file any notice of appeal from the Confirming Order, to a date subsequent to the entry of this Memorandum Opinion.

I. ISSUES AND RECORD

The issues raised by the RKR objections consumed most of the time during the confirmation hearings. While the record at times reads as though a utility rate case was going on before this Court it must be emphasized that notwithstanding the extensive testimony and cross-examination relating to rates, accounting methods, and ratemaking procedures, the issue before this Court raised by these objections is not what actual rate orders would be issued by the New Hampshire Public Utilities Commission ("NHPUC") if this plan were not confirmed and a litigated rate case ensued, but rather whether the Rate Agreement embodied in the

plan is a fair and equitable compromise in that regard under applicable bankruptcy reorganization case law and standards.

It also should be noted that considering the unique nature of this regulated public utility debtor, the Section 1129(a)(7) test of "best interests" is essentially the reverse side of the same "fair and equitable" issue, i.e., would common stockholders receive more net value if a chapter 7 trustee or and successor in interest conducted a litigated rate case with regard to the Seabrook investment.[1]

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[1]Technically, the Section 1129(a)(7) test would only require a showing --- which is obvious here --- that liquidation of the debtor would produce less value than a going concern reorganization under a plan. However, due to the unique circumstances that no termination of electric service to the public would be permitted in the disposition of the assets of this debtor in a chapter 7 proceeding, the Court has throughout these proceedings indicated that an alternative application of the 1129(a)(7) standard would be appropriate to protect creditors

During the course of the confirmation hearings the Proponents put on a number of expert witnesses with regard to utility operations, accounting methods, and ratemaking case procedures, to establish that the rates provided under the Rate Agreement in the plan were in fact fair and equitable in terms of what might come out of a litigated rate case. The RKR objectors put on no witnesses other than Mr. Richards himself. The case presented by the RKR objectors consisted primarily of extensive cross-examination of the witnesses put forward by the Proponents in those areas in which the tes-

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and stockholders. As stated in the Disclosure Statement "[T]he Bankruptcy Court has stated that in applying the best interests test in this case it also will compare the value achieved by the Rate Agreement with the value that might be realized by the Debtor under traditional rate-making principles in a litigated rate case if Seabrook were to operate."[Disclosure Statement, Court Doc. No. 2998, p. 70]

timony was found to be credible and persuasive notwithstanding cross-examination. In those areas in which a substantial dispute or question remains in the record the Court will so indicate.

II. KEY FINDINGS AND CONCLUSIONS

For ease of reference beyond the foregoing incorporation by reference, this Opinion will set forth at this point the pertinent provisions of Paragraph 28 of the Confirming Order dealing with the objections to confirmation here in questions:

> Each of the Objections to Confirmation that have been filed is hereby overruled . . . . This also includes without limitation the Objections filed by the common stockholders, Martin Rochman, Edward Kaufman, and Robert Richards ("RKR"), referred to in Paragraph 69 of the General Findings and Conclusions, contending that greater value could be realized for stockholders by a litigated rate case before the New Hampshire Public Utilities Commission as opposed to the compromise embodied in the Rate Agreement under the Plan. The credible evidence, however, supports a finding that PSNH could not recover

> substantially more under a traditional rate case than it would under the Plan because it is unlikely PSNH would recover significantly higher rates under a rate case. Even if PSNH were successful in obtaining higher rates, the impact of such rate hikes would likely lead to a loss of customers and loss of net revenue to PSNH, and ultimately to a lower return than that proposed under the Plan. Moreover, the expectable delay of approximately three years in obtaining the action by the NHPUC and the N.H. Supreme Court, with interest and other charges accruing to superior classes at approximately $176 million per year makes it even more unlikely that rate increases of a magnitude sufficient to overcome this "additional hurdle" to getting value down to the common could be achieved. The sum total of the evidence before the Court on this issue supports a finding---here made---that the rate increase results under the Rate Agreement represents a fair and equitable settlement and compromise well within the range of results reasonably expectable in a litigated rate case. The RKR Objection contending that a rate case would result in more value for the Debtor than that proposed under the Plan is hereby denied for the reasons set forth above.

Likewise, for ease of reference and incorporation, the supporting Findings and Conclusions included in Section G, Para-

graph 60-70 of the General Findings of Fact and Conclusions of Law entered April 20, 1990, are set forth as follows:

G. 1129(a)(7)

60. Acceptance of the Plan by the impaired classes has not been unanimous. Therefore, the Plan must provide each holder of a claim or interest that has not accepted the Plan with an amount equal to or greater than the amount he, she or it would receive under chapter 7.

61. In determining the liquidation value of the Debtor, the Court will look first to the breakup value of PSNH. If the Debtor were sold in parts, the evidence in the record suggests that the value of the pieces is less than the Debtor's going concern value. As stated in the expert testimony presented by NUSCO's financial advisors, while some pieces of the Debtor might have value independent of their inclusion in an integrated electric utility, many of the Debtor's assets do not. In addition, if multiple parties bought pieces of the Debtor it is not clear who, if anyone, would bear the responsibility to serve the PSNH customers. Because of this uncertainty, it is highly unlikely that the State would permit the Debtor to be sold in pieces. If PSNH were sold in pieces, it would bring less than what is being offered under this Plan.

62. An alternative liquidation analysis of PSNH would be the value of PSNH sold as a going concern. The liquidation value of the Debtor as a going concern is found to be no higher than the value that is proposed under this Plan. This bankruptcy has been in effect an auction of PSNH, which has been highly publicized and generated national attention and several substantial and serious bidders. Three utility companies with competent counsel and financial advisors competed actively to submit a winning plan proposal.

63. The significant publicity surrounding this bankruptcy has assured that any interested potential bidder was informed about this case. Interested bidders had many opportunities to negotiate with the Committees, the Debtor, and the State under the special procedures adopted by the Court for this unique case. The unusual problem of "valuation circularity" presented by a chapter 11 reorganization of a regulated monopoly utility company, and the special procedures employed in this reorganization case to deal with that unique problem, have been discussed at some length in prior opinions of this Court. See, e.q., In re PSNH, 88 B.R. 521 (Bankr. D.H.H.1988); In Re PSNH, 88 B.R. 546 Bankr. D.N.H. 1988); In re psnh 99 B.R.155 (Bankr. D.N.H. 1989); In re PSNH, 99 B.R. 177 (Bankr.D.N.H. 1989); In re PSNH, 108 B.R.854 (Bankr. D.N.H. 1989).

64. The plan that ultimately suc-

ceeded in attracting the support of the Committees was the plan that offered the most value for the Debtor. A Commission of the Federal Energy Regulatory Commission has stated that this auction assured that maximum value was paid for the Debtor. Therefore, the Court finds that the liquidation value of the Debtor is no more than what has been offered for the Debtor in this Proposed Plan.

65. The Debtor would not command as high a price in a normal chapter 7 liquidation because of the value added to the Debtor by the Rate Agreement entered into with the State. This Rate Agreement provides certainty for the purchaser of the Debtor about rates than can be charged and, therefore, revenues that will be generated, without the delay and cost of litigation. A sale of the Debtor without the Rate Agreement would not command as high a price because the purchaser would discount the value of the Debtor to account for this uncertainty.

66. This Plan, therefore, provides more to the creditors than they would receive under a normal chapter 7 liquidation for the following reasons:

a. The liquidation value of the company in a chapter 7 would not be as high as it is for this chapter 11 Reorganization;

b. In a chapter 7 bankruptcy, there would be a significantly

greater number and amount of unsecured creditor claims resulting from the rejection of contracts. In particular, rejection of the contracts with the small power producers alone would generate additional claims of more than $600,000,000. In addition, there would be the time element and administrative expense of a chapter 7 liquidation which would increase the administrative expenses of the bankruptcy and force the claim and interest holders to wait until the bankruptcy was concluded before receiving any dividend from the estate. Furthermore, interest on secured debt would continue to accrue.

c. In a liquidation, the Court finds that insufficient funds would be generated to pay the full amount of unsecured claims. There would be no distribution with respect to interests in a liquidation.

67. The suggestion that the State could take over the Debtor by eminent domain or otherwise, so as to preserve more value for the estate, is mere conjecture and speculation. There is no evidence that the State has any interest in taking over the Debtor. Even if the State had expressed such an interest, there is no legal authority or financing capacity for the State to take over the Debtor for a value greater than that proposed under this Plan. The New Hampshire General Court has recently passed a bill which would legislate the New Hampshire Energy Authority out of existence.

68. There is no reason whatsoever to conclude that the United State would ever take over the Debtor or Seabrook.

69. The final approach to liquidation and analysis of this decidedly unique Debtor --- wherein it or its successor or successors in no event will cease to supply electricity to customers in New Hampshire --- is to consider a non-normal liquidation scenario comparing the return to the estate under the Plan with the return the Debtor or its successors could expect to receive under a traditional ratemaking proceeding for its interest in the Seabrook plant. The Court itself during the disclosure statement hearings and proceedings insisted this alternative be set out for the consideration of creditors and stockholders before they were called to vote upon the Plan. the objections to the confirmation filed by common stockholders Rochman, Kaufmman, and Richards ("RKR") generally raise this issue in the sense that they question the appropriateness of the Rate Agreement and compromise embodied in the Plan and argue that more value could be realized for shareholders if the Plan is denied confirmation and either the debtor-in-possession or its successors were authorized to pursue a litigated rate case before the NHPUC. This contention is considered and rejected in the confirming order entered separately this date. There is no requisite showing that the members of the impaired classes would receive more under a

litigated rate case than is provided for them under the Plan. Section 1129(a)(7) therefore is satisfied under the alternative liquidation analysis approach as well.

70. The Court accordingly determines, in consideration of all the foregoing, that holders of claims or interests will receive under the Plan property with a present value not less than that they would receive under a chapter 7 liquidation of the Debtor under either a breakup value analysis, an auction sale analysis, or a rate case analysis.

III. APPLICABLE LEGAL STANDARD

The Supreme Court in 1968 set out the basic approach for a reorganization court in evaluating a substantial compromise involved as part of the plan of reorganization in Protective Committee v. Anderson, 390 U.S. 414 (1968). the Court there reversed an order confirming a reorganization plan under chapter X of the prior Bankruptcy Act in that it found that the reorganization court had not exercised the close enough judgment and review of the proposed compromise, suffi-

cient to reach an informed view of the fair and equitable nature of the compromise. The Supreme Court set forth the basic standard to be followed in this situation as follows:

> Compromises are "a normal part of the process of reorganization." Case v.Los Angeles Lumber Prods. Co., 308 U.S. 106, 130 (1939). In administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims as to which there are substantial and reasonable doubts. At the same time, however, it is essential that every important determination in reorganization proceedings receive the "informed, independent judgement" of the bankruptcy court. National Surety Co. v. Criell, 289 U.S. 426, 4236 (1933). The requirements of §§174 and 221(2) of Chapter X, 52 Stat. 891, 897, 11 U.S.C. §§574, 621(2), that plans of reorganization be both "fair and equitable," apply to compromises just as to other aspects of reorganizations. Ashbach v. Kirtley, 289 F.2d 159 (C.A. 8th Cir. 1961); Conway v. Silesian-American Corp., 186 F.2d 201 (C.A. 2d Cir. 1950). The fact that courts do not ordinarily scrutinize the merits of compromises involved in suits between individual litigants cannot affect the duty of a bankruptcy court to determine that a proposed compromise forming part

> of a reorganization plan is fair and equitable. In re Chicago Rapid Transit Co., 196 F.2d 484 (C.A. 7th Cir. 1952). There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise with the likely rewards of litigation. It is here that we must start in the present case.

When a substantial compromise is embodied in a reorganization which effectively "short-circuits" the formal provisions required for plan confirmation under chapter 11 of the Bankruptcy Code, the courts have not hesitated to apply the general requirements for evaluating compromises in reorganization proceedings as first announced in the Anderson case. See, e.g., In re Continental Investment

Corp., 642 F.2d 1, 4 (1st Cir. 1981); In re Emerald Oil Company, 807 F.2d 1234, 1239 (5th Cir. 1987); In re American Reserve Corp., 841 F. 2d 159, 162 (7th Cir. 1987); In re A & C Properties, 784 F.2d 1377, 1382-1383 (9th Cir. 1986); Matter of Texas Extrusion Corp., 844 F. 1142, 1158-1159 (5th Cir. 1988); Reiss v. Hagmann, 881 F. 2d 890, 892 (10th Cir. 1989). Indeed, the policy underlying the application of this standard is so strong that it has been held to apply equally to pre-confirmation compromises presented during the course of reorganization proceedings under the Bankruptcy Code. In re Aweco, 725 F.2d 293 (5th Cir. 1984) cert. denied, 469 U.S. 880 (1984).

The Court of Appeals for the First Circuit has noted that there have to be some limits as to the degree of detail on the underlying controversy that must be examined by the trial court before con-

sidering approval of the compromise and settlement. The court of Appeals stated in Greenspun v. Bogan, 492 F. 2d 375, 381 (1st Cir. 1974 the following:

> The settlement might not be so favorable to CMI as would a final judgment on the merits. But any settlement is the result of a compromise --- each party surrendering something in order to prevent unprofitable litigation, and the risks and costs inherent in taking litigation to completion. A district court, in reviewing a settlement proposal, need not engage in a trial of the merits, for the purpose of settlement is precisely to avoid such a trial. See United Founders Life Ins. Co. v. Consumer's National Life Ins. Col, 447 F. 2d 647 (7th Cir. 1971); Florida Trailer & Equipment Co. v. Deal, 284 F. 2d 567, 571 (5th Cir. 1960).

Bankruptcy Rule 9019 establishes the discretionary power of a bankruptcy court to approve or disapprove compromises or settlements. It has been held that in the exercise of that discretionary power it is not necessary for the bankruptcy court to decide questions of law or fact raised by objectors. In re Teltronics Services,

Inc., 762 F.2d 185 (2d Cir. 1985).

The reorganization court in In re Texaco Inc., 84 B.R. 893 (Bankr. S.D.N.Y. 1988), appeal dismissed, 92 B.R. 38 (S.D.N.Y.1988) was presented with the question of confirmation of a plan of reorganization which included within itself a compromise of a judgment claim held by a creditor, Pennzoil, in the amount of $11.3 billion for a settlement amount of $3 billion pursuant to the plan. The court approved the compromise as part of the confirmation of the plan of reorganization and noted [84 B.R. at 902] the following:

> (1) The balance between the likelihood of plaintiff's or defendants' success should the case go to trial vis a vis the concrete present and future benefits held forth by the settlement without the expense and delay of a trial and subsequent appellate procedures.
>
> (2) The prospect of complex and protracted litigation if the settlement is not approved.

(3) The proportion of the class members who do not object or who affirmatively support the proposed settlement.

(4) The competency and experience of counsel who support the settlement.

(5) The relative benefits to be received by individuals or groups within the class.

(6) The nature and breadth of releases to be obtained by the directors and officers as a result of the settlement.

(7) the extent to which the settlement is truly the product of "arm-length" bargaining, and not of fraud or collusion.

See Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968); In re W.T.Grant Co., 699 F. 2d 599 (2d Cir. 1983), cert. denied , sub nom; Casoff v. Rodman, 464 U.S.822, 104 S. Ct. 89, 78 L.Ed 2d 97 (1983).

IV. THE SEABROOK INVESTMENT

Construction and Cost

PSNH began construction of a nuclear power plant at Seabrook, New Hampshire

after receiving a siting certificate in 1974. PSNH was the lead utility with regard to the Seabrook project, originally holding 50 percent of ownership of the proposed plant along with a number of other joint owners compromising the major utilities in New England. PSNH's original ownership interest was reduced to 35.6 percent by various agreements and sales involving the other joint owners in the early 1980s.

The Seabrook plant was originally planned as a two-unit nuclear power plant (having two nuclear reactors) with a projected total cost of approximately $1.3 billion with completion projected for Unit I for November of 1979. On May 7, 1979 the State of New Hampshire enacted legislation (commonly referred to as the "anti-CWIP" law) which prohibited any recovery in rates for any construction costs expended by a utility in construc-

tion of a plant until such plant was actually on line producing power commercially. [RSA § 378.30-a] Notwithstanding this development, which in effect substantially increased the cost of completion of the Seabrook plant (due to the need to borrow money at interest to cover the cost of completion until the plant could go on line) PSNH management and the other joint owners determined to proceed with completion of the Seabrook plant.

As events turned out, only one unit of the plant was competed ad that did not occur until October of 1986. Since that date, due to various delays in getting a full operating license from the Nuclear Regulatory Commission, and the delay in these chapter 11 proceedings which were commenced on January 28, 1988, the total cost of the Seabrook plant with all carrying costs and interest charges as of

January 1, 1990 is approximately $6.5 billion. Of that total investment, the amount invested by PSNH itself as a joint owner, as of January 1, 1990, was approximately $2.9 billion.

It is this greatly escalated cost of the Seabrook plant, and the ultimately inability of PSNH to borrow sufficient monies to cover its public debenture debt incurred in financing the construction of the plant until it could go on line, that led to the chapter 11 petition filed by PSNH on January 28, 1988. The NRC finally issued a full operating license on March 1, 1990, and the Seabrook plant is expected to proceed into commercial operation within the next few months. An appeal from the NRC decision is pending.

The chapter 11 filing followed by two days a decision by the New Hampshire Supreme Court not to permit "emergency" rate increases necessary for covering

pressing PSNH public debt payments in the face of the Anti-CWIP statute. See Petition of Public Service Company of New Hampshire, 130 N.H. 265 (1988). The same escalated Seabrook plant construction and delay costs, and the question of how much of those costs would be recoverable in a litigated rate case before the New Hampshire Public Utilities Commission, is at the nub of the RKR objections to confirmation. The Confirmed Plan provides in effect for recovery of between $1.4 billion and $1.54 billion (depending on various contingencies) of the $2.9 billion that PSNH invested in the Seabrook plant.

Excess Cost Plants

It was no secret during the 1980s and before that utility companies throughout the nation were having trouble getting full recovery of their investments in "excess cost" power plants. This

development had to do primarily with regard to nuclear power plants that had precipitated unprecedented controversy and delay due to citizen groups asserting various safety and environmental concerns. Articles appeared in the professional literature regarding this novel problem for regulated utilities. Such utilities had been accustomed during the earlier decades of this century to almost automatic recovery of costs expended for new plants from the various state regulatory commissions. See e.g. Pierce, "The Regulatory Treatment of Mistakes in Retrospects: Cancelled Plants And Excess Capacity", 132 U. of Pa. Law Review 497 (1984); Goldsmith, "Utility Rates and "Takings'". 10 Energy Law Journal, 241 (1989). See also, general discussion of "two tumultuous decades" for electric utility companies in an article by Charles M. Studness, "The Electric Utili-

ties During the 1970s and 1980s," Public Utilities Fortnightly, Vol. 125, pp. 40-47 (February 15, 1990).

The phenomenon of the "white elephant" nuclear power plant, with costs so high that utility rates to customers would have to reach unprecedented levels to recover such costs, was not a topic restricted to professional journals. The Wall Street Journal in an Op-Ed article on October 9, 1984, entitled "Whom to Soak When Utilities Take a Bath?" led the article with a paragraph stating: "Electric Utilities' construction costs, mainly for nuclear plants, have mushroomed into a multi-billion dollar cloud of doom over the industry." A later lead article on October 2, 1986, on page one of the Wall Street Journal, was entitled: "'Prudency Reviews' Are Changing the Way Utilities Set Rates: Regulators' Scrutiny Results in Big Cost Disallowances for

Some Nuclear Plants."

The 1987 Write-Down

Robert M. Busch, Senior Vice President of Finance and Chief Financial Officer of Northeast Utilities, testified that the PSNH board properly wrote down Seabrook in early 1988 (for the 1987 year financial reports) and that that accounting decision was appropriate at the time. The PSNH write-down was approximately $1 billion of $2.9 billion investment. It was based essentially on the "unreasonable possibility of full recovery" of Seabrook's costs. Many other utilities had to write-down nuclear power plant costs --- even before regulators required it. The witness himself did it for NUSCO for its Seabrook share ownership two years ago. The PSNH change in accounting was shown at page 38 of its Form 10K Report to the SEC for the 1987 calendar year.

PSNH's cost per Kilowatt ("KW") hour was 8 cents at that time. It would be 16 cents if all Seabrook costs were recovered with approximately a 89 percent one-time increase. The general rates in New England run about 7 1/2 cents on average.

PSNH clearly could not charge 16 cents without suffering substantial defections by commercial and industrial users. Management realized the severe ramifications of the 1988 write-down of Seabrook on the books of PSNH. They realized that would lead the NHPUC to claim that amount as a cap in any rate litigation. But they determined that they couldn't recover more than $1.8 billion and that continuing to carry the full Seabrook costs on the books would be misleading to investors. The change was made on their general financial statements.

PSNH did <u>not</u> change the Form 1 (the so-called "regulatory books" submitted to

various regulatory agencies) because they wanted to preserve higher value for Seabrook power if that power became more valuable in the future (for example, if oil prices escalated again) and higher value also contingent upon the appeal then pending in U.S. Supreme Court. The Form 1 is filed with FERC as well as with NHPUC.

Bruce W. Wiggett is the comptroller of Public Service Company of New Hampshire. Wiggett testified that Assistant Attorney General Larry M. Smuckler (now Chairman of the NHPUC) stated during the negotiations on the plan of reorganization that PSNH would never recover more than the $1.8 billion that management had indicated was recoverable.

The Examiner appointed by the Court in this proceeding, Paul L. Gioia, who served as Chairman of the New York State Public Service Commission during most of

the 1980s, also indicated that the fact of the 1987 write-down would be given serious weight in a regulatory proceeding as to the upper limits of cost recoveries even though the write-down would not be legally binding upon a regulatory commission.

Andrew B. Herf is a partner in the Accounting and Auditing Group of Arthur Andersen and Company. He has worked for that company for about 20 years. His specialty is the public utility area. Herf testified at length about the 1987 write-down by PSNH management. [See Transcript, Court Doc, No. 3722, pp. 246-269] He noted that PSNH in its 1987 write-down eliminated equity items and replaced "regulatory interest" with "commercial interest." This amounted to an approximate $1 billion reduction to a $1.8 billion asset value for Seabrook. To Herf, the fact that management did not continue

to capitalize interest after the write-down (although they had done so before and could have continued to do so under accepted accounting principles) meant that management felt that the $1.8 billion was a ceiling. Herf testified that one reason management could know in 1988 that they couldn't get the other $1 billion out of Seabrook was simply that Seabrook at a $6,000 to $7000 KW capacity cost was not economic when compared to capacity costs of other plants running in the $2000 to $3000 per KW range. Herf testified that if that were true in 1987, its is even more true today with a more intense competitive environment.[2] Under

[2] At the conclusion of the Disclosure Statement process in November of 1988, the court required the debtor to indicate the maximum it would seek in a litigated rate case --- for disclosure purposes on the range of results regarding the compromise --- and Mr. Levin for the debtor stated in open court that the company would not seek more than $1.8 billion in recovery of Seabrook costs in

the plan the KW capacity cost would be approximately $3,500.

V. THE PLAN/COMPROMISE

The Plan Auction

Robert M. Spann is a senior consultant for Charles River Associates, an economic and management consulting firm with offices in Boston and Washington, D.C., as well as a lecturer in economics at George Washington University. His area of expertise is regulatory economics and finance and high thrust economics and statistics. He has a B.S., a Masters, and an Ph.D in economics from North Carolina State University. Spann testified that in view of the "auction" of PSNH which occurred during the course of these reorganization proceedings, by virtue of the multiple competing plans filed, if the company were worth more "with the rate

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a litigated rate case.

case to go forward" another buyer would have come in and offered more under "market" conditions.

John F. Curley is managing director in the Merchant Banking Department of Morgan Stanley, an investment banking firm. He has worked with that company since 1978. He has a B.A. and MBA from Dartmouth College. Curley testified that the NUSCO plan offered the highest value available in view of the fully publicized auction process over a clearly sufficient time period of two years to attract market interest and in view of the fact that four legitimate bidders (all being substantial regional utility companies) did enter the bidding process.

The Plan Compromises

Seabrook is valued in the plan at $700 million, plus an "acquisition premium" of another $700 million, for a total $1.4 billion in Seabrook value. The cal-

culations with regard to value according to Curley are $2.3 billion in plan value, comprised of $900 million for assets other than Seabrook and $1.4 billion of Seabrook costs to be recovered. The Seabrook recovery however could be up to $1.54 billion depending on other variables and contingencies. The Rate Agreement, which includes the Seabrook recovery, was negotiated constantly up to the final NUSCO plan being joined in by the committees. There was no agreement on rates before a plan agreed to by the major parties was presented.

Curley testified at length as to the $2.3 billion in values intended to be realized under the NUSCO plan. He also testified as to the step 1 and step 2 implementation procedures with regard to the plan. Under the plan, NUSCO would need to raise an initial $458 million in cash on the effective date and has $300

million of that already committed. A total of $1.357 billion to $1.457 billion will ultimately be required to fund all cash payments under the plan.

Morgan Stanley is "highly confident" that it can sell the securities on the rates and terms indicated to fund the plan under both steps. It has given a letter to that effect. The Rate Agreement is essential to confidence in the markets to purchase the securities according to Curley. It is critical in that regard that the seven years of fixed rate path and three years of additional stability in rates under the Rate Agreement be available for marketing the securities. Moreover, the return on equity "collar" included in the Rate Agreement gives additional comfort in that no one can predict everything that may occur over 10 years and the collar, in effect, protects against items that might have been missed

in the projections for all sides.

Curley also testified at length as to feasibility and performance by the reorganized debtor under the plan, including the strong management regarding nuclear plants and the excess winter-time capacity and other synergies that NUSCO "brings to the table" as additional value under the plan.[3] He testified that the value attributable to the equity holders, Classes 11, 12 and 13, would range from $170 million to $500 million depending on various contingencies. He testified further that both the Official Committees and the State of New Hampshire wanted to litigate the rate case initially but finally decided that a negotiated rate

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[3]NUSCO'S peak load, due primarily to air conditioning, occurs in the summer; the peak load of New Hampshire, due primarily to skiing, occurs in the winter. This Court rejoices in being on the right side of <u>that</u> particular synergy.

agreement was in the common interest. Curley was actively engaged in the negotiations for NUSCO.

Wilber L. Ross, Jr. is employed by Rothschild Inc. He has been involved in many large bankruptcy reorganization cases in the United States as a financial advisor to a major party in interest. He has a B.A. from Yale University and an MBA from Harvard University. Ross testified for NUSCO regarding the difficulty in the negotiations that led to the consensual plan. Ross was the investment banker retained by the Equity Committee. Essentially, the negotiations ultimately resolved down to "give-ups" by various senior interests to let value go down to the equity holders. These items included $218 million in post-petition interest claims given up by the unsecured creditors and $145 million of pre-petition dividends and $99 million of post-peti-

tion dividends by the preferred shareholders. The Equity Committee was the principal party threatening a litigated rate case in the negotiations.

Price Paths/Charts

Peter Fox-Penner is the Vice President of Charles River Associate. He has a B.A. in electrical engineering from the University of Illinois, a Master's in mechanical engineering from the University of Illinois, and a PhD in economics from the University of Chicago. His doctoral dissertation, and other post-graduate publications have concerned electric utility regulation. His specialty at Charles River Associates is electrical utility matters. His clients are national in scale. He testified as to the calculations on a "price path" and an "equilibrium price path." The latter concept examines a sequence of prices over time to include consistency in price/revenue

planning in terms of actual revenues to be collected.

Penner prepared and identified the two charts (NUSCO Exhibits 8 and 9) which illustrate the range of utility rates in New England with a black line on Exhibit 8 representing the price path under the reorganization plan. The black line is in the red band (the top 20 percent of the chart) until 1997. The plan prices therefore are higher than the prices charged to 80 to 90 percent of all other electric power customers in New England. [Transcript, Court Document No. 3672, p. 176] The price path on the chart does take into account expected losses to self-generation, fuel switching, and the resulting lower use of electricity.

The second (broken) line on Exhibit 9 shows RKR's idea of a maximum "constitutional rate path" in the view of witness Spann. This shows 18-cent to 19-cent

rates as opposed to a New England average of 7 1/2 cents. Actually, RKR rates would be 16 to 17 cents but the witness assumed loss of sales from the high rates so raised the rates necessary to actually collect the entire $2.9 billion of Seabrook costs.[1] The chart does not consider municipalization dangers.

The top of the red band on chart Exhibit 8 is not the breakpoint which would cause a death spiral of ever increasing defections from the system prompting still higher rates causing further defections. Rates could go appreciably higher if allowed by the NHPUC. When rates do go too high, the "death spiral" means that you not only lose the

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[1]The RKR objectors argue that they would use a long-term "phase-in" of the Seabrook higher recovery and could ameliorate the indicated rate shock. However, this long-term proposal encounters significant other problems discussed below.

increased rates, but all rates from customers who go off the system.

Phase-In Approaches/Limits

In Spann's view "phase-in" approaches, while ameliorating the "rate shock" impact by allowing lower initial rates for A Seabrook recovery, just mean that "you collect larger dollars later rather than now." Spann testified that "phase-ins" have benefits and costs, i.e., there is no such thing as free lunch.

Full Seabrook Recovery

Busch testified there is no reasonable way that the $2.9 billion cost of Seabrook could be put into a rate base in view of competitive pressures and other economic considerations. A phase-in would ultimately require more than $2.9 billion in recovery. Spann testified that if you tried for a $2.9 billion recovery over 10 years, you would probably start at about

13 cents early on but by mid-decade rates would go over the line and above 20 cents. This assumes the 10-year maximum phase-in period that accountants require. PSNH at the time of the 1987 write-down of Seabrook estimated a one-time rate increase of 130 percent would be necessary for recovering Seabrook costs. That increase currently is estimated at 89 percent. The drop from 130 percent to 89 percent regarding the increase to recover Seabrook costs was related, among other things, to lower fuel oil costs under current market conditions; the fact that the cost of equity variable dropped significantly during the time period after 1987; and that the net revenues were up and other asset values fluctuated.

One-Time 31 Percent Increase

The RKR objectors rely heavily on the reference in the Disclosure Statement (p.73) to the Bower-Rohr Study (Bower

Rohr & Associates) commissioned by the debtor in early 1989 stating that a one time rate increase of 31 percent, plus yearly inflation increases thereafter, would be affordable. The reference indicates that the "normal" rate increase discussed would be an average and assumes the actual increases would vary among customers classes.[2] Rates now charged are approximately 9 cents per KW hour.

An increase of 31 percent the first year and then increases with inflation assumed to be 4 percent per year would result in high rates existing nowhere in New England except on "island" or "peninsulas" having special requirements. The prices would be 12 cents at the outset. Wiggett recognized the Bower-Rohr study

[2]There is no indication in this record as to how such increases would vary, i.e., how or whether existing "rate design" practices of the NHPUC would be changed.

indicated a 31 percent rate increase would be bearable, but he expressed the opinion it was not feasible due to economic and political realities and the uncertainties as to the actual effects of such an increase. The Business and Industry Association for one would react to such an increase as "absurd" and has indicated that more than a five percent increase in rates will induce industry to leave New Hampshire.

The Bower-Rohr Report discussion of a rate increase of 31 percent is before the court only in terms of the brief discussion of the Report that is included in the Disclosure Statement. The report is not in evidence before the court nor were witnesses called by the RKR objectors to testify directly as to the

conclusions reached.[3]

Off-Load Danger

David E. Kleinschmidt is a senior consultant in the Engineering Science of Arthur D. Little, an international planning and technology consulting company. He has worked for this company since 1976, and specializes in utility and power generation technology. He has a B.A. in chemical engineering from MIT, and a Master's from MIT. He has particular expertise with regard to power-generation, co-generation, and self-generation matters.

Kleinschmidt conducted a survey and interviews with substantial commercial user candidates during the period between

[3]The Bower-Rohr 31 percent reference in the Disclosure Statement is a fact but was put there by Court direction only to alert equity holders to the alternative arguments as to bearable rates. It was there for voting purposes only. It is not independent evidence that such rates would be collectable.

November 1988 and January 1989 with a follow-up in March of 1990. They involved some seventeen likely candidates for going off the system.

Kleinschmidt testified at length as to his study; ran a model with a ten-year simulation; discussed generation systems "easily purchased"; and the marketing effects going on in New Hampshire currently in that regard. He testified that significant self-generation is already occurring in New Hampshire and that it would be a serious threat with greatly increased electric rates.

Kleinschmidt testified further as to other factors involved and noted that the perception of where electric rates are going is very important --- more so than the actual current rates. From his survey, he noted that companies who are likely candidates for self-genefation or co-generation are largely aware of the

reorganization case and are waiting to see what happens. He found that they have already crossed the "psychological barrier" and so would be ready to decide on self-generation rapidly and implement the same in the face of substantial rate changes.

Kleinschmidt testified that the loss of demand over 10 years due to the increased rates would be approximately 45 MGW; or in other terms lost sales of 280,000 MGW hours per year. This translates to a loss of 1 1/2 years of growth. He testified that the large commercial customers were the most likely to go off the system and that you would not only lose their revenues but those customers typically cost less to service so you have a doubly negative economic effect. Presently, there is some 50 MGW in capacity by co-generation of industrial customers of PSNH. There is at least that

much capacity in self-generation and considerably more if waste-to-energy plants are included.

The Examiner's questions to Kleinschmidt suggested that changes in "rate design" (i.e. reducing the higher, subsidizing rates typically charged industrial customers) could cut down the off-load danger of higher rates. The witness did not think the off-load danger here could be covered by that device. Moreover, disturbing the rate design subsidy pattern would probably provoke a violent legislative reaction.[4]

Curley also testified, with regard to the off-load danger, that you don"t

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[4]It is noteworthy that in the recent "PSNH legislation" concerning the Rate Agreement that the New Hampshire legislature took special care to forbid any altering of rate design by the reorganization company without approval by the legislature itself. See N.H.R.S.A. 362-C:8 (December 18, 1989), which is attached as Exhibit G to the Disclosure Statement.

lump all customers in this type of analysis, since you would lose the most profitable customers and also lose the more dense load as well.

Municipalization

William G. Moss is Vice President of the Energy Group at Charles River Associates, where he has been employed for six years. He specializes in microeconomic, statistics and econometrics with a focus on energy and other regulated industries. He has a B.A. and Ph.D in economics from the University of California at Berkeley.

Moss has studied municipalization attempts during 1970-1989 and found 79 such attempts. He concluded it was a viable option in New Hampshire but probably would not occur under the NUSCO plan. It would probably occur at a 1 1/2 to 2 cent per KW hour increase.

Of the 79 municipalization attempts that Moss studied, 20 resulted in muni-

cipalization and 23 are still pending. Of the 20 that succeeded, they tended to involve small municipalities of up to 10,000 customers. However, major municipalization attempts are pending with regard to New Orleans and Chicago.

Wiggett, the controller of PSNH, testified regarding the studies done in Nashua, New Hampshire in 1987 and 1988 considering possible municipalization. The city put the matter on hold pending the bankruptcy resolution. The third broken line on chart Exhibit 9 shows the effects of a hypothetical municipalization of Nashua, New Hampshire. The rates literally "go off the chart" under that scenario. The resulting twenty cent rates would mean PSNH would suffer a serious loss of its most profitable business.

On cross-examination, Wiggett admitted that gain from a sale of utility property due to a municipalization would

go to the bottom line for investors but "in the long run it would not be good because the company would be losing revenue from a lot of customers."

Transmission Access

Penner testified that you can't effectively charge more than costs for a transmission access because of NHPUC and FERC regulatory policies fostering competition. A newly-formed utility company serving Concord and Exeter, New Hampshire, in fact did recently go off the PSNH system and forced PSNH to run other purchased power through PSNH's lines at cost after a proceeding before the NHPUC.

VI. LITIGATED RATE CASE

Commission Ratemaking/Process

During the course of the hearings the Court requested that the State of New Hampshire file a non-adversarial memorandum of exposition setting forth the basic

procedures and principles with regard to ratemaking and rate cases under New Hampshire law. That memorandum, filed April 11, 1990 as Court Document No. 3572, with certain non-material deletions, is excerpted and attached as an Annex to this Opinion. The Court also received a Supplemental Report from the Examiner on this matter, filed April 6, 1990, as Court Document No. 3455. As noted above, the Examiner himself has served as Chairman of a major state public utility commission. The following extracts from the Examiner's Supplemental Report, which extracts I deem to be non-adversarial in this context, are useful in setting forth the general principles and procedures relating to ratemaking for regulated monopoly public utility companies:

> For ratemaking purpose, a utility's costs are broken down into two basic types, operating expenses and

capital costs. An operating expense is generally defined as a good or service which will be consumed by the utility within one year. These include costs such as fuel, labor, insurance and taxes. While not readily apparent, depreciation is included as an operating expense since it represents one year of economic wear and tear on the utility's equipment.

Capital costs are the costs associated with financing the utility's investment in assets that provide service to the public. The "rate base" is made up of utility assets that will provide service for more than one year. The value of these assets is generally calculated on the basis of prudent original cost less depreciation, and is limited to assets that have been financed by funds provided by utility investors and not other sources (such as customer deposits or tax benefits).

Once the rate base has been established, the PUC must determine the "rate of return" that the utility should earn on the rate base. The cost of debt securities is relatively easy to determine since they usually carry a fixed rate of interest. The same is generally true for preferred stock. The cost of common equity invested in the utility, however, is more difficult to ascertain, since for most utilities the return demanded by common stockholders is determined by the financial market and is constantly chang-

ing.

* * *

The ratemaking process may be expressed as a simple formula: "R = O + (B x r), where R is the utility's allowed revenue requirement; O is its allowed operating expense; B is its rate base, defined as cost less depreciation of the utility's property that is used and useful in the public service, . . . and r is the rate of return allowed on the rate base." Appeal of Conservation Law Foundation of New England, inc., 127 N.H. 606, 633-34, 507 A.2d 652 (1986) (citations omitted).

* * *

A PUC usually operates pursuant to a broad statutory authorization with a general mandate to establish "just and reasonable" rates [see RSA 374:2; 378.] without specific direction as to how that is to be accomplished. PUCs normally adopt extensive rules and regulations, within the broad framework of their statutory authorization, that govern their regulation of utilities. PUCs also develop policies with respect to specific issues relating to utility regulation. The regulations and policies adopted by a PUC are subject to change whenever the PUC concludes that the public interest so requires.

In the early days of utility regulation, legislatures set rates for utilities, including railroads

and early gas and electric companies. That approach proved unsatisfactory for many reasons, including the perception that utilities had gained undue influence through the lobbying of legislator and that the legislative process is not well-suited for dealing with the complex issues related to utility regulation.

The rate setting process is often referred to as a legislative function, reflecting the fact that it was originally exercised by legislatures before being delegated to PUCs. The rate setting function is also referred to as legislative, as distinguished from judicial, to indicate that PUCs have broad discretion and, unlike judicial officers, are not disinterested arbiters between contesting parties, but represent the public and have a direct responsibility to protect the public interest in safe and adequate service.

Ratesetting, however, is also referred to as 'quasi-judicial", which reflects the fact that PUCs' administrative proceedings have become relatively formal and parties who appear before them are expected to be accorded a fair hearing and reasonable treatment. Furthermore, PUC ratesetting decisions must be based on the record developed in a proceeding, and are subject to judicial review. Judicial review, however, is limited and the courts are required to respect the broad discretion and expertise of the PUC.

The record includes considerable discussion as to why we have regulatory commissions with regard to electric power companies and regarding the "legislative nature" of the NHPUC as one aspect of its activities. Busch testified that commissions were created not simply to insulate from political pressures, but primarily because the subject was "too arcane" for the legislature to deal with. He agreed that utility regulators have great flexibility but noted that they still have to exercise that discretion on a record and not arbitrarily. Busch testified that regulatory discretion is always a risk but there is more risk "if 420 legislator are doing it."

Curley testified that there are "tons of subsidies" (also expressed as a "plate of spaghetti") in the way utilities are regulated by PUCs, i.e. the PUC tends to allow "the farmer at the end of

the line" to get electricity at affordable costs by in effect requiring other customers to subsidize some of that cost. PUCs simply would not allow dumping of all of the costs of the customers that go off the system upon the "little people" who have to take electricity no matter what it costs.

Wiggett has been involved in many NHPUC proceedings and testified emphatically that the process is not a simple equation with the "four factors" set forth in the literature. The company has the burden and must put on persuasive evidence; competition is a factor; and the company "cannot price itself out of the market."

Herf testified that you cannot predict exactly what PSNH would get in a rate case but that the $2.3 billion company value under the plan is within the reasonable range of outcomes of a con-

tested rate case. Herf also testified that the rate arena and the regulatory-political environment the utility is in has to be considered with regard to rate cases and rate levels.

Return on Equity

Busch testified regarding how return on equity is determined, including a discussion of "forcing shareholders to sell stock below book value." Richards cross-examined Spann at length regarding the debt-equity ratio testimony and cost and return on equity calculations, etc. The return on equity level for PSNH in 1986-87 pursuant to PUC orders was 15 percent. Wiggett agreed with Richards' point that return on equity can be defined as the return that must be paid to induce common stockholders to buy stock at a price above book value. The concept of "dilution" therefore means selling shares below book value. Wiggett testi-

fied however that "dilution" was not a factor in any rate case with which he has been involved. Herf testified that there are many, many way to calculate return on equity.[5]

Seabrook Rate Case/Delay

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[5] A leading treatise echoes this thought and the "circular question" problem that has been endemic to this reorganization case: "The most difficult problem in determining the overall cost of capital arises in estimating the cost of equity capital. The relevant question is: How much must a utility earn to induce investors to hold and to continue to buy common stock? In answering this question, it is important to realize that circular reasoning is involved. In the absence of a fixed, expressed, or implied commitment as to the dividend rate, the actual cost of floating a stock issue is indeterminate. Investors' decisions are largely based on a utility's expected earnings and upon their stability, as well as upon alternative uses of investment funds. Yet, since the allowable amount of earnings is the object of a rate case, a commission's decision, in turn, will affect investors' decisions." Phillips, The Regulations of Public Utilities, p. 375, Pub. Util. Reports, Inc. (1988) Cf. also the "Between Scylla and Charybdis" reference by Justice Holmes in Cedar Rapids Gas & Light Co. v. Cedar Rapids, 223 U.S. 655, 669 (1912).

Seabrook is the most expensive nuclear plant ever built, for its capacity, and probably would result in a write-off of 50 to 60 percent in a litigated rate case, according to the testimony of witness Spann. He also testified that PUCs nationally are requiring a "performance clause" even when nuclear power plants are allowed into rate base. The objective is to be able to suspend cost recovery when, as often is the case, the plants are not operating due to various problems. If the NHPUC required this in a Seabrook rate order, even assuming the higher recovery in a litigated rate case under the RKR assumptions, the company would be back in the bankruptcy court when Seabrook had its first operational problem, although it purportedly would have a right to recover all its Seabrook costs. It was obvious according to Spann that if Seabrook costs two to three times

more than any other plant the PUC would look at that as a factor in determining rates.

Ross calculated $2.68 billion in claims ahead of the common stockholders in the absence of a consensual plan as of the time of the confirmation hearings. Accordingly, if the plan is not confirmed, the litigated rate case would have to produce $2.68 billion in total company value, plus $176 million per year until a new plan could be confirmed before distributions made under a new plan could reach down to common stockholders after covering the full rights of the senior classes. The $176 million a year is comprised of $135 million per year accruing on post-petition interest on the unsecured claims and $41 million per year on post-petition dividends to the preferred shareholders.

Wiggett testified that he didn't

believe that the company would get the full $1.8 billion from the PUC; he estimated that it was more probable that it would get $1.4 billion to $1.5 billion. PSNH in a rate case would seek return on equity that would attract stock investors at a price above book value.

There would be negotiations in a rate case with regard to future Seabrook operational contingencies even apart from the items regarding recovery of the costs of Seabrook. The negotiated rate plan has protections with regard to those future contingencies.

Robert C. Richards is an attorney and also holds PSNH common stock. He acted as attorney for the RKR objectors and also testified himself at the hearings. Richards was an attorney for the Long Island Lighting Company from 1971 to 1984. From 1984 to 1989 he was a member of the Strategic Planning Department and

the Financial Planning Department of LILCO during the time of construction of the troubled Shoreham nuclear power plant on Long Island. He has a B.A in math from Yale University, a J.D. from Harvard University and an MBA form New York University.

Richards testified that he believed that the company could get "much greater value" because of the New Hampshire law regarding recovering prudent investments; that the Bower-Rohr Report indicating a 31 percent increase plus inflation thereafter would be bearable should have been relied upon; and that alternatively PSNH could charge the NUSCO plan rates then continue thereafter with inflation for greater value. He argued that almost no burden has been imposed upon ratepayers under the new NUSCO plan since no rate increases occurred during the chapter 11 in 1988-1989 and that rate levels will go

down after 2000 A.D. under his analysis. He feels this is unfair. He testified that the rates in 2001 and after would be less than the New England regional average.

Richards' basic argument revolves around his question of "who should pay for what the politicians in Massachusetts and New Hampshire did to PSNH?" He refers to the anti-CWIP law that drove up costs and was "a bet" that Seabrook would not run; that the investors won that bet so they should get the recovery regardless of the $6000 to $7000 KW capacity cost; and that the big cost in Seabrook was the interest cost and delay cost that should not have happened.[6]

Richards testified generally to these matters at the April 12, 1990

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[6]It is true that $1.6 billion of the total $2.9 billion of PSNH's Seabrook cost is comprised of carrying charges.

hearing. [Transcript, Court Document No. 3739, pp. 43-80, 202-210]

Effects of RKR Proposal

The RKR proposal assumes, according to witness Spann, $2.5 billion worth of debt. Spann here was dealing with the RKR alternative of a 31 percent initial increase followed by 4 percent per year after that. [Transcript, Court Document No. 3688, pp. 86-89] This would be 70 percent of the $3.6 billion value ascribed to the company under that proposal. This debt-equity ratio would be much higher than all but 4.7 percent of publicly-held companies of all types reported in the leading statistical publication. It is unheard of for a utility company.

The $2.5 billion debt instead of $1.6 billion debt under the plan would mean 50 percent higher fixed debt service costs. If the debt were only backed by

Seabrook the reorganized company would have to pay higher interest costs according to Spann. The company would have a "razor-thin margin" if anything went wrong and would very likely be right back in the bankruptcy court if that occurred. Spann noted recent experiences with the Boston Edison Nuclear Power Plant involving considerable down-time of that plant. Spann expressed the view that the debt required under the RKR proposal would in effect be "contingent notes on the Seabrook performance for 20 years." Seabrook income uninterrupted would be essential to servicing a $2.5 billion debt for the reorganized company. The market would react accordingly so that even if the RKR rates were obtained from the NHPUC the debtor still would not realized the greater value due to the 70 percent debt-equity ratio.

Richards' admitted that his proposal

would not satisfy currently applicable accounting guidelines. He referred to his formula as "a phase-in to last for the entire life of the asset" referring to the projected 39 year expected life span of the Seabrook plant. Richards also admitted that his "present worth to annuity" concept and formula has not actually been used in any ratemaking case so far.

Questions by the Examiner brought out that the real impact of the depreciation and cost recovery approach put forth by Richards is in the later years, beyond the 10 year period testified to by Richards, and that you would really need to extend the projections considerably to see the actual effects of that proposal. There would be a very large deferred account that would have to be amortized in the future. [Transcript, Court Document No. 3739, pp. 121-125]

The RKR proposal also ignores the

fact that stock investors look at net income and dividends and gives no real consideration to what happens to utility stock if the utility quits paying dividends because there are no retained earnings. The fact is the market price for the shares would drop. [Transcript, Court Document No. 3739, pp. 131-135]

Richards was asked how the company would finance new debt borrowings for ordinary operating purposes if it was showing losses or low earnings on its books until ultimately recovering through high rates in the future. Richards' response was that analysts would see big increases in rates coming and the company would be in good shape in a few years, i.e. there would be good cash flow but no earnings. [Transcript, Court Document No. 3739, pp. 191-192] As indicated above, however, this has never been actually accomplished in real world

market conditions. Generally, the RKR objector' contentions were presented as part of a highly theoretical construct. [Transcript, Court Document No. 3739, pp. 156-179]

GAAP/FASB Accounting

In reporting the value of its investment in Seabrook PSNH was bound by Generally Accepted Accounting Principles ("G.A.A.P."). Historically PSNH had accounted for Seabrook in accordance with Financial Accounting Standard No. 71 ("FAS-71"), promulgated by the Financial Accounting Standards Board ("FASB"), which sets forth the accounting principles and rules for regulated utilities. When a power plant is accounted for under FAS-71, the plant construction costs and an allowance for funds used during construction ("AFUDC"), which represents a reasonable return on both the debt and equity invested into the project, are

added into the cost of the asset and capitalized on the utility's balance sheet. The premise for adding in AFUDC is the expectation that it will be recovered when the power plant goes into service. The standards for FAS-71 accounting require a utility to be: (1) subject to ratemaking by an independent regulatory body; (2) with ratemaking done on the basis of cost; (3) by a regulatory commission that is able to set rates than can be both billed and collected.

If a utility determines it no longer meets the criteria for FAS-71 accounting it must cease FAS-71 accounting for an asset and switch to traditional accounting analysis. When PSNH ceased FAS-71 accounting for Seabrook it reaccounted for the entire asset under traditional commercial accounting methods. PSNH removed all AFUDC from its valuation of Seabrook and replace it with capitalized

interest.

Under FAS-71 the company had to reverse its accounting for Seabrook in 1987, according to Wiggett, since PSNH could not recover the cost of seabrook at rates that were collectable. FAS-71 also restricts any "phase-in" to require that those deferred costs must be recovered within 10 years. If the company can't recover them in 10 years, it has to write the value down and "you can't carry it as an asset." If a company goes off FAS-71 then it can no longer capitalize return on equity but it could continue to capitalize debt return i.e. interest.

The Financial Accounting Standards Board was created because "the SEC never did it" according to witness Herf. These are independent accounting experts who are supposed to provide a "due process procedure" before promulgating their accounting guidelines. The SEC adopts the

FASB rules for registrants under their jurisdiction. There would also be ethical rule problems regarding a "clean statement" by a CPA auditing firm, if FASB guidelines were not met, pursuant to rules of the American Institute of Certified Public Accountants. A public company realistically needs such a CPA statement in order to sell securities. In the mid-1980s the FASB entity was concerned with the fact that "regulators were designing rate plans that pushed off cost recovery long into the future." Some utilities tried such schemes before the FASB promulgation but they went back to the PUCs to get rid of them primarily because of Wall Street concerns rather than GAAP.

Herf testified that underwriters put heavy pressure on management to use GAAP. Herf further testified that all "sinking fund" devices make accountants nervous because the later year costs are usually

higher and you have less years to recover those costs. With a nuclear power plant you commonly also have retrofitting expenses, and other unanticipated operational expenses, so you don't smooth out the costs as anticipated under a sinking fund device in actuality.

The utility industry fought the 10-year rule in the FASB hearings vigorously, but FASB concluded that "if you can't get it done in 10 years" the utility has substantial uncertainty regarding recoverability.

The RKR unconventional depreciation and cost recovery proposal would not be allowed under GAAP. Wiggett recognized the existence of unconventional theories regarding recovering of greater costs over a longer time --- or other accounting approaches to depreciation involving excess costs plants --- but that such theories were not realistic because the

SEC in effect would freeze securities sales if such non-GAAP devices were employed. In his and Herf's view, as a practical matter, a company cannot be a public entity without GAAP accounting.[7]

Other Seabrook Recoveries

Busch testified at length regarding UI's recovering of 57 percent of Seabrook --- indicating it was actually more because of recovery of construction costs during construction. With regard to the Millstone Plant in Connecticut, NUSCO wrote off $110 million originally but the PUC ultimately forced a settlement involving a $400 million writeoff. The

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[7]Herf emphasized that uniquely in the regulated utility environment "you can drive revenue requirements by depreciation" and that this could have significant back-loading effects that is the basic reason for rejecting novel "economic depreciation" methods for such companies. Herf testified in great detail regarding GAAP and FASB accounting matters at the April 11, 1990 hearing. [Transcript, Court Document No. 3722, pp. 144-188, 194-205, 209-226]

Examiner points out that the larger the dollar figures involved in an excess cost plant the higher the percentage write-down will be and that PSNH had a larger share of Seabrook than UI or NUSCO. He notes that on a more appropriate KW capacity cost basis, in a survey of allowed nuclear power plant recoveries, the PSNH recovery under the plan is within the range of other recoveries.

Other Nuclear Plant Recoveries

There are no actual write-offs of 50 percent or more in recovery of nuclear power plant costs. Herf testified that he has studied nuclear plants having high costs of $4,000 KW capacity costs or over and having 900 MGW or over in size, and found nine plants in that category. However, he indicates there are a whole host of variables in that you cannot really predict from these cases the possible Seabrook write-down in a regulatory

proceeding.

VII GENERAL CONCLUSION

The objections to confirmation by the RKR objectors on the basis that significantly greater rates and enterprise value could be obtained for the company by a litigated rate case, as opposed to the results obtained under the Rate Agreement embodied in the Plan of Reorganization, boil down to two essential points: (1) that except for a very small portion PSNH's expenditures in completing the Seabrook plant were all prudently incurred and therefore would justify and require NHPUC approval of full recovery of such prudently incurred costs under applicable statutory and constitutional requirements; and (2) that PSNH could ameliorate the "rate shock" effect of full recovery of such costs by employing a "phase-in" recovery together with recovery well beyond the 10-year period

applicable under currently accepted accounting standards by the use of some imaginative though unconventional deferred cost recovery mechanisms.

With regard to the prudent investment recovery point, the objectors see this principle as a fixed star governing what the regulatory agency can do with regard to the recovery of costs associated with the Seabrook nuclear power plant, and argue further that the requirement is of constitutional dimension. The Supreme Court of the United States however has expressly declined to adopt prudent investment recovery as a constitutional standard. Duquesne Light Co. v. Barasch, 109 S.Ct. 609, 619-20 (1989). The auction which all courts have exhibited in avoiding an exclusive focus on prudent investment as a cost recovery standard stems from the desire to avoid an unwarranted incentive for over-capacity generation by

public utilities. See Pierce, "The Regulatory Treatment of Mistakes in Retrospect: Canceled Plants and Excess Capacity", 132 U. of Pa. Law Review 497 (1984).

New Hampshire itself, in its statutory and regulatory framework, has both the "prudent" and a "used and useful" standard in this regard, undergirded by the ultimate "just and reasonable rates" statutory language provided in NH RSA 378:7. This legal framework for regulatory action is a far cry from the simplistic "prudence only" position put forward by the objectors. It obviously implies a balancing to cover both the initial analysis at the beginning of the plant construction as well as the ultimate effect of the plant coming on line at a particular time and at a particular cost.

The New Hampshire PUC and the New Hampshire Supreme Court gave ample warnings to PSNH in this regard in various

ruling issued during the course of the Seabrook plant financing and construction. See, e.g., Petition of Public Service Co. of New Hampshire, 130 N.H. 265 (N.H. 1988); Appeal of Public Service Co. of New Hampshire, 130 N.H. 748 (N.H. 1988);Re Public Service Co. of New Hampshire, 70 N.H.P.U.C. 886, 904 (1985):Re Public Service Co. of New Hampshire 68 N.H.P.U.C 668, 670 (1983); Re Public Service Co. of New Hampshire, 67 N.H.P.U.C. 223, 231-2 (1982): Re Public Service Co. of New Hampshire, 67 N.H.P.U.C. 490, 525 (1982); Re Public Service Co. of New Hampshire, 65 N.H.P.U.C. 492, 493 (1980).

The New Hampshire Public Utilities Commission said clearly and unmistakedly in 1985 in Re Public Service Co. of New Hampshire, 66 PUR 4th 349, 70 NHPUC 164, 246, 247 (1985):

If in a subsequent rate pro-

ceeding it is found that part of the capital investment in Seabrook I is imprudent so as to cause excessive and burdensome rates not economically justified, the Commission may disallow part of the Seabrook investment.

* * *

While there are constitutional guarantees of the opportunity to earn a fair return, rates may not be "prohibitive, exorbitant, or unduly burdensome to the public." (262 U.S. at p. 290, footnote 2, PUR1923C at p.201, footnote 2.) The essential reconciliation of prudent investment and reasonable, not unduly burdensome rates may be accomplished in a rate proceeding when PSNH seeks rate support for the addition of Seabrook to its rate base. A prudency investigation should be initiated by the Commission on a timely basis to assure an in-depth analysis of prudent investment and the reasonable rate level for a fair return to investors without unduly burdening ratepayers.

Similarly, in Appeal of Public Service of New Hampshire, 122 N.H. 1062, 1076 (N.H. 1982) the New Hampshire Supreme Court stated:

Thus, while management in the first instance may be free generally to make its own decision about its level of investment in new construc-

tion, see Appeal of Legislative Utility Consumers' Council, 120 N.H. 173, 175, 412 A. 2d 738, 739 (1980), it must bear in mind that as a regulated company not all costs may be recovered from the public when the plant is completed.

A vested right to build is not a vested right to have customers pay. PSNH itself agrees that the PUC may reject management decisions "[w]hen inefficiency, improvidence, economic waste, abuse of discretion, or action inimical to the public interest are shown." Re Public Service Company Util. Consumers' Council v. Public Util. Com., 117 N.H. 972, 380 A.2d 1083 (1977).

And, again, in 1986, the New Hampshire Supreme Court explained in Appeal of Conservation Law Foundation of New England, Inc., 127 N.H. 606, 637-8, 647 (1986):

[T]he principles of prudence and usefulness . . .are significantly different in at least one respect that is of great potential significance for the treatment of Unit I expenditure in the light of what due care required at the time an investment or expenditure was planned and made, usefulness judges its value at the time its reflection in the rate base is under consideration. Under the "used and useful" principle, the commission is not asked to second-

guess what was reasonable at some time in the past, but rather to determine what can reasonably be done now with the fruits of investment. It is therefore not surprising that the commission's flexibility in applying the usefulness principle extends to judgments about the inclusion or not of investment in property held for future use. See LUCC, 119 N.H. at 343-44, 402 A.2d at 633-34; N.H.Gas & Elec., 88 N.H. at 55, 184 A. at 605; C. PHILIPS, Jr., supra at 316.

* * *

[I]t is important to bear in mind, as Commissioner Aeschliman's separate opinion indicates, that the principle of used and useful property will also be applicable in determining rate base. In the face of rate issues that are unparalleled in the State's history, we should recall that the usefulness principle lends itself to development over time and under new conditions . . . We therefore attend seriously to the suggestions of the separate opinion, that the burden of excess capacity that may be created by such giant projects may appropriately be shared as between investors and customers. . . . , and that the usefulness principle may be applied to effect such a shared allocation. (Citations omitted.)

The legitimate ratemaking expectations of PSNH and its investors under

New Hampshire law are summed up in the decision in Petition of Public Service Co. of New Hampshire, 130 N.H. 265, 280 (1988) as follows:

> Any vested right which the company [had] when it commenced construction was a right to the constitutional guarantees of [Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 521, 64 S.Ct. 281, 88 L.Ed. 333 (1944); namely, "just and reasonable rates" based in part upon property used and useful in the generation of electricity. This right exists today. It has not been taken away by the anti-CWIP law. Neither the company nor its investors had a vested right to the economic status quo at the time of the investment decision. Such matters as increasing costs, inflation, high interest rates, conservation, the OPEC cartel, and the myriad of other factors affecting business judgment are the concerns of the free market and its forces which ultimately fall upon management to assess. Not all management decisions are reviewable or subject to cure in the judiciary.

It should also be remembered that New Hampshire is a state that does not have as statutory framework which requires prior PUC approval for power

plants to be constructed by its regulated utilities. PSNH itself decided to build the Seabrook plant and decided to continue to build the plant even after the costs skyrocketed for various reasons.

The Supreme Court of the United States has indicated in dicta that a "shift in methodologies" by a state regulatory agency in midstream with regard to the construction of a regulated utility plant might present a question of constitutional due process violation as a "taking" if shown. See Duquesne Light Co. v. Barasch, 109 S. Ct. 609, 619 (1989) ("The risks a utility faces are in large part defined by the rate methodology because utilities are virtually always public monopolies dealing in an essential service, and so relatively immune to the usual market risks. Consequently, a State's decision to arbitrarily switch back and forth between methodologies in a

way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions.") In the present case the Court inquired as to whether the objectors could show any such shift in ratemaking methodologies on the part of the New Hampshire which might present a basis for constitutionally-required full recovery of Seabrook costs but in my judgment the objectors were unable to point to any such shift.

This Court does not need to determine for present purposes whether PSNH in a litigated rate case could not obtain some additional rate increases and value for the company but simply whether there is a substantial basis for the expectation voiced by the objectors that such a proceeding would result in recovery of anything close of full cost recovery for

the Seabrook plant. It may well be, as objectors argue, that it would be shown in such a proceeding that only a small fraction of the Seabrook construction costs could be considered imprudent in the sense of mismanagement, negligence, or wasteful construction activity. But that cramped view of the "prudency" concept no longer can be assumed to be a controlling factor in the current regulatory ratemaking process.

The concepts of "prudency" and "used and useful" according to the record before me, and the applicable case law, are evolving concepts that regulators are using to effectuate an appropriate balance in the sharing of costs associated with excess cost power plants between ratepayers and investors. In other words, it is at least arguable, notwithstanding the best management and control of costs in the actual construction of a

plant, that the decision to go forward with the construction and completion of the plant may be deemed imprudent if it will result in a power plant coming on line with electricity too expensive to be used at the high rates necessitated by full recovery of the associated construction costs. Cf . In re Western Massachusetts Electric Co., 80 PUR 4th 479, 542 (Mass. D.P.U. 1986). the same broadened meaning of the "used and useful" concept could also arguably can be applied to effectuate a sharing of costs of such a plant, as indicated in the New Hampshire decisions cited above. The very concept of excess capacity created by a plant too expensive for customers to use is a phenomenon largely attributable to the experience in recent years of massive cost overruns with regard to

nuclear power plants.[8]

Even apart from any effect that the 1987 write-down might have in a rate case, the record before me independently establishes that it would be unlikely that PSNH could recover appreciably more than $1.8 billion in recovery of Seabrook costs in a litigated rate case, and that it is quite uncertain whether even the $1.8 billion is realistically achievable. This record emphatically establishes PSNH in a litigated rate case would have to face vigorous and sustained opposition by

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[8]The phenomenon was recognized however in other contexts as early as 1949 by the New Hampshire Supreme Court as noted in In re New England Telephone & Telegraph Co. v. State, 95 N.H. 353, 360 (1949), "If as the report of the Commission implies, construction undertaken by the [c]ompany is 'wasteful' or its expense is unwarranted by the demand probable at the necessary price for service produced by it, . . . unwarranted investments may be excluded from rate base, and unjustified expenditures from the determination of a reasonable return." (Emphasis added)

the State of New Hampshire, together with various active citizen groups opposing Seabrook and its associated costs.

The argument would be made that at some point in the late 1970s and early 1980s it had to be obvious to PSNH management that the kilowatt capacity costs and charge rates per kilowatt hour attributable to full recovery of the Seabrook construction and completion costs were going out of sight; that the company had numerous warnings from the NHPUC and the New Hampshire Supreme Court regarding the ultimate balancing that would have to be done in determining the reasonable rates for the company; that the GAAP accounting realities would limit any phase-in and deferral of costs to a 10-year maximum period; and that at a total cost recovery level the collectable rates that could be charged and recovered in the real world simply would not support

full recovery of the Seabrook investment.

If it were assumed for present purpose that PSNH could establish in a litigated rate case that it was "entitled" to full recovery of its Seabrook investment, under current ratemaking principles, the record does not indicate any likelihood that such costs could be recovered out of rates within a time frame permissible under current accounting and regulatory policies. The evidence is uniform that under current accounting standards and practices no regulated utility has been able to show as current assets on its financial statements any assets whose costs could not be recovered in a 10-year period.

While the RKR objectors have put forward interesting and imaginative arguments and theories as to why GAAP principles and the FAS-71 requirement should be disregarded in this context, to permit

greater recovery over a longer time period of the Seabrook costs, that accounting approach admittedly is unconventional and has not been used by any utility or regulatory agency to date. If such an unconventional approach is to be established it probably will require a strong, highly solvent utility with the necessary financial staying power to litigate the matter in a regulatory proceeding and associated appeals for the time necessary to overturn the current accounting and regulatory practices in that regard. PSNH simply is not in that strong financial position and therefore this Court cannot find a reasonable likelihood that if it denied confirmation of the pending Plan the company in fact would achieve the "breakthrough" in current practices that the objectors desire.

Moreover, regardless of a successful result in a regulatory proceeding, to

adopt unconventional cost recovery and accounting practices with regard to the Seabrook plant, there still remains the "real world" effect of such practices in terms of reaction by the financial markets and utility analysts who would be essential to the issuance of future securities and public debt necessary, not only for the initial cash requirements of a reorganization plan, but also necessary to finance the reorganized company's ongoing operations. The record before me is replete with various question marks and uncertainties as to the market reaction in that regard that could interject into any renewed reorganization plan proceedings a significant question of feasibility in terms of such necessary financing and access to the capital markets in that context.

Finally, it has to be recognized that while the Court for present purposes

has to balance various "likelihoods" in making a surface determination as to whether the plan compromise is fair and equitable, and a better result than could be obtained in a litigated rate case, the one thing that is not uncertain is the inexorable accruing of further massive amounts of additional claims by the senior interests above the common stockholders during the period of delay necessary to achieve the greater value in a litigated rate case. It is the net result that is crucial to the equation in evaluating the position of the common stockholders. In my judgement it is likely that it would take approximately three years to get through the 18-month NHPUC process and the inevitable appeals in the New Hampshire Supreme Court and the United States Supreme Court. However, even if it were assumed that the novel position espoused by the RKR objectors could be

established in only two years, that lesser period of delay still would result in such substantial additional obligations ahead of the common stockholders that it would be very unlikely that the net result of value flowing down to the common stockholders would be appreciably greater than that presently available under the confirmed plan of reorganization.[9]

Accordingly, for all the reasons indicated above, the Court concludes that the Rate Agreement compromise embodied in the Plan of Reorganization is within the range of expectable results from a litigated rate case and is in fact fair and

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[9]During their oral argument on this matter counsel for the Creditors Committee stated that for the creditor group itself the company would "need to get a homerun in the Seabrook rate case to cover us" when the costs of delay are considered. Counsel for the Equity Committee amended that by noting that "the numbers are so large, you don't have to hit a homerun, you have to hit a grand slam. . . ."

equitable in the circumstances; and furthermore that the Plan does not violate the provisions of Section 1129 (a) (7) of the Bankruptcy Code in that the class to which the objecting common stockholders belong would not in any event achieve a greater recovery if the Plan is denied confirmation and the case proceeded under Chapter 7 of the Code.

DATED at Manchester, New Hampshire this 17th day of May, 1990.

JAMES E. YACOS
JAMES E. YACOS
BANKRUPTCY JUDGE

Debtor to serve Full list

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ANNEX

MEMORANDUM OF THE STATE OF NEW HAMPSHIRE REGARDING THE UTILITY RATEMAKING PROCESS

(Docket No. 33572 - Filed April 11, 1990)

E X T R A C T S

The State of New Hampshire submits this Memorandum in response to the request of the Court made at the hearing held on April 5, 1990, relating to the proposed confirmation of the Third Amended Joint Plan of Reorganization filed by Northeast Utilities Service Company, et al.

* * *

I. Nature and Role of PUC in Ratemaking

No public utility is permitted to charge any amount for any service except as provided in its tariff on public file at the Commission. At its most basic, then, a rate proceeding is a process by which the Commission approves changes in tariff provisions.

The New Hampshire Supreme Court has characterized tariff provisions as involving more than contractual obligations of the utility and its customers. Tariff provisions have the "force of law". See Appeal of Pennichuck Water Works, 120 N.H. 562, 566 (1980). In that same case, the Supreme Court characterized the nature of the PUC's action in setting rates as "essentially a legislative function." As a result, tariff provisions are subject to the limitations of Part 1,

Article 23 of the New Hampshire Constitution prohibiting retrospective laws. Ibid. pp. 565-566.

Although this function is "legislative", the PUC is, nonetheless, an agency constituted within the executive branch of State government. The Commissioners are appointed by the Governor and Council and the rulemaking and adjudicatory proceedings of the Commission are governed by the State Administrative Procedure Act, RSA Chapter 541-A and due process requirements of the New Hampshire Constitution. See Appeal of Concord Steam Corp., 130 N.H. 422 (1988).

* * *

II. Description of PUC Rate Proceedings

* * *

The PUC's tariff filing rules are contained at New Hampshire Admin. Rules, PUC 1601.1-1603.09. These rules require the utility commencing a rate case to provide not less than thirty nor more than sixty days' notice to the Commission. The filing requirements for such a case require the utility essentially to file its direct case with the request for an increase in rates, together with numerous additional items. While the filing requirements are substantial, they are intended to avoid delay by requiring the utility to file at the outset those items which would almost certainly be obtained later in the case through discovery.

Once the utility makes the necessary filing, including revised tariff pages, the PUC must determine within

thirty days whether to allow the tariff change to become effective or to suspend the effectiveness of the tariff revision pending investigation by the Commission RSA 378:6. Obviously, unless the change is de minimis, the Commission takes the latter course. The Commission will then issue an Order of Notice setting the matter for a pre-hearing conference. At the pre-hearing conference, a procedural schedule is set and a first effort is undertaken at narrowing the issues for decision. Discovery generally proceeds in the form of data requests, which are interrogatories and requests for the production of documents. The number of data requests will vary depending on how complex and how controversial the issues of the case may be. In a straightforward case where the utility has fully complied with the tariff filing requirements, the number of data requests mat be fairly limited. However, the number of data requests can be substantial. For instance, in the pending rate proceeding involving New England Telephone and Telegraph Company, DR 89-010, the number of data requests addressed to New England Telephone from the Commission staff and the other parties to the case has numbered in excess of 1,400. It is certainly safe to assume that the number of data requests in a case involving an adjudication of the prudence of expenditures for Seabrook would generate a substantial amount of data requests.

The procedural schedule will call for the pre-filing of testimony by the participants in the proceeding including, in addition to the petitioning utility, intervenors and staff. The schedule may also accommodate rebuttal testimony.

Each instance of the filing of testimony will be followed by a period for discovery with respect to that testimony. One or more conferences among the parties and the Commission staff are generally held for the purpose of discussing the potential for settlement and at a minimum narrowing the issues to be litigated. Finally, hearings are held before the Commission. If there are matters which have been settled, those matters are presented for approval by the Commission. Matters which have not been settled or which are the subject of settlement agreements that are not approved by the Commission are adjudicated in the hearing process.

Under RSA 378:6, the Commission's final decision on permanent rates must be made within one year following the rate case filing, except in the instance of an addition to rate base which exceeds 50 percent of the utility's existing capital investment, in which case the decision must be rendered within 18 months. This decision can be appealed pursuant to RSA Chapter 541; there are no statutory time limit on action by the Supreme Court or by the PUC on remand.

Under RSA 378:27, the Commission is authorized to approve temporary rates pending the final decision. Generally, temporary rate orders allow for increases or decreases with respect to items which appear from a preliminary review of the rate case filing to be likely to be allowed in any event. If the rate increase allowed in the permanent rate order at the end of the case provides for an increase in excess of what has been allowed in temporary rates, the utility is

permitted to recoup the difference between what it would have charged had it had rates during the temporary rate period been set at the permanent rate level and what was actually charged. This amount is normally collected over time in the form of a surcharge. Similarly, if the permanent rate order results in rates that are lower than the temporary rates, the difference in levels for the period of the temporary rates must be refunded by the utility to customers in the manner directed by the Commission.

If temporary rates are not allowed, the utility is permitted to place the entire amount of the rate increase into effect under bond six months after the originally proposed effective date of the tariff pursuant to RSA 378:6. If the rate increase allowed in a permanent rate order is less than this full amount, the difference between the amount collected under bond and the amount which would have been recovered at the permanent rate level must be refunded to customers.

III. The Ratemaking Formula

A. In General

The basic ratemaking formula has been described by the New Hampshire Supreme Court in the case of Appeal of Conservation Law Foundation, 127 N.H. 633-648 (1986). Basically, the utility is permitted to earn a reasonable rate of return on amounts prudently expended for property used and useful in providing service to the public after allowed expenses. This amount is the "revenue requirement" of the public utility.

The determination of the revenue requirement is made by examining the financial performance of the utility during a historical period and extrapolating therefrom the likely future financial performance of the utility. The historical period selected is called "test year." The Commission will examine the expenses incurred during that test year, the amount invested in capitalized assets (the "rate base"), and the return earned by the utility. See Appeal of Public Service Company of new Hampshire, 130 N.H. 748, 758 (1988); New England Tel & Tel. Co. v. State, 113 N.H. 92, 95-96 (1973).

B. The "Rate Base"

Amounts included in rate base consist primarily of amounts invested in items of real and personal property used in the utility business less accumulated depreciation. For electric utilities, these items include primarily generating stations, substations, transmission lines, distribution lines and various office and other types of buildings used in providing electric service. With respect to items which are allowed to be included in rate base, the utility is permitted to receive a return "of" and "on" amounts invested in those assets. The return "of" the investment is provided in the form of an allowance of depreciation or amortization as an expense. The return "on" those items is provided through the allowance of the rate of return on the unamortized balance.

In addition to costs associated with physical property, certain expenditures by the utility which warrant recovery

over a period of longer than one year are capitalized and amortized over a longer period. The requirement to capitalize such amounts and the amortization periods may be prescribed within the Commission's Uniform System of Accounts or by specific Commission order.

The rate base will usually also include a working capital allowance to provide investors with a return on funds made available by the utility to pay expenses before revenues to cover such expenses are recovered from customers.

Whether an item will be permitted to be included in rate base will depend on whether and to what extent expenditures were "prudently incurred" and whether the resulting asset is "used and useful" in providing service to the public.

* * *

In measuring rate base, the New Hampshire PUC has generally used a rate base which is averaged over the entire test period as opposed to looking at account balances as they exist on any single date.

Because the nature of the process is to take a historical period and project from it future results, the PUC will also take into account certain known and measurable changes. Accordingly, if there have been substantial changes in the rate base which will definitely affect future financial results, these known and measurable changes may be reflected. The inclusion of such changes, however, is tempered by the "matching" requirement, namely, the requirement to match expens-

es with revenues. Many times new investment will result in new revenues. Therefore, care is taken to make sure that the reflection of known and measurable changes does not have the effect of overstating or understating the likely effect of the change on ultimate operating income. See Appeal of Manchester Gas Co., 129 N.H. 800, 806 (1987).

The rate base is also adjusted to reflect certain deferred taxes. See Appeal of Public Service Company of New Hampshire, 130 N.H. 748, 757-760 (1988).

C. Expenses

The Commission will also look in detail at expenses which are included within the test year. Expenses will be excluded for ratemaking purposes where they have been imprudently incurred or where they are incurred for non-utility purposes or are otherwise unnecessary for the conduct of the company's utility business. Expense amounts will also be adjusted for known and measurable changes. New expenses which are likely to be experienced prospectively may be included as pro-forma adjustments to the test year expense amounts. Expenses which are not likely to recur will be correspondingly excluded.

Based upon the foregoing analysis, the Commission will determine a pro-forma rate base and the pro-forma expense level that will be used in determining the revenue requirement.

Generally, then, items included in test year expenses are recovered through rates in current annual revenues. There

is a recovery "of" these amounts, but because they are recovered currently, the ratemaking process does not provide a return "on" these amounts)other than indirectly to a certain extent through the working capital allowance). This is in contrast with rate base amounts which are recovered over a longer period with a return being provided on the unamortized balance.

E. Return

Next in the analysis is the determination of the allowed rate of return. The allowed rate of return allowed is required to be not less than the utility's cost of capital. The cost of debt capital is a matter which can be readily determined based upon the interest rate of the debt and the amortization of any issuance expenses, premium and discount. The same is substantially true for any preferred stock which the utility may have outstanding, the terms of which will be established by the utility's Articles of Incorporation. The more difficult matter is the determination of the cost of common equity. This determination will involve the testimony of experts. The Commission in recent years has generally followed a discounted cash flow analysis in determining the cost of common equity. The Commission may also consider the "risk methodologies. See Morin, Roger, Utilities Cost of Capital, Public Utility Reports, Inc., 1984; Gordon, Myron J., The Cost of Capital to a Public Utility, MSU Public Utility Studies, 1974; Kolbe, A Lawrence, et al. The Cost of Capital --- Estimating the Rate of Return for Public Utilities, MIT Press, Cambridge, Mass. 1984; Philips,Charles F.,Jr., The

Regulation of Public Utilities, 2d Ed., Part II (Theory of Public Utility Regulation), Public Utility Reports, Inc., 1988. See also Appeal of Public Service Company of New Hampshire, 130 N.H. at 751-757.

Based on this analysis, the cost of each component of capital is determined and weighted in accordance with the proportion of that component to the total amount of capital. The Commission may also look at whether the utility's capital structure is appropriate. In doing so, the Commission will examine whether the capital structure provides the utility with sufficient strength to withstand potential economic adversity and to have access to the capital markets in order to raise the funds necessary to invest in plant necessary to meet the requirements of service to the public. The Commission may also look at the economic efficiency of the capital structure. Among the factors the Commission will consider are the costs savings which can result from debt capital through the deductibility for tax purposes of interest payments. However, the Commission will also consider the impact of the risks associated with leverage on the cost of debt and equity capital. Generally, the Commission will be looking to a capital structure which provides long-term strength for the utility and which is likely to produce the lowest overall cost of capital in the long run. In an appropriate case, the Commission may determine the allowed rate of return on the basis of an imputed capital structure rather than the actual capital structure recorded on the utility's books of account. See, Appeal of Conservation Law Foundation, 127 N.H. at

635-636; New England Tel & Tel. Co. v. State, 98 N.H. 211, 220 (1953).

An additional factor which may be reflected in the return is an "attrition" allowance. This kind of an allowance is more traditionally included in an environment of high inflation, where the simple fact of inflation is likely to result in a failure of the utility to earn its allowed rate of return on a go-forward basis even if the utility preforms exactly as contemplated in the pro forma test year calculation. Other arguments with respect to potential attrition in specific areas and its ratemaking treatment may also be made.

F. Calculation of Required Increase

The Commission next compares the pro-forma net operating income of the utility for the test period with the amount which results from the multiplication of the rate base times the allowed percentage rate of return. If the pro-forma net operating income is less, the amount by which it is less is the "revenue deficiency" to be recovered through increased rates. If the utility is a private corporation required to pay income taxes, the deficiency will be grossed up for the amounts by which the rate increase will necessarily increase the expenses for federal and state income taxes (including the State franchise tax imposed under RSA 83-C). This deficiency, grossed up for the tax effect, is the amount of the required rate increase.

The Commission then determines the rate classes from which the increase will be collected in the manner described in

more detail in the Prior Memorandum [filed by State of New Hampshire on March 8, 1988, Docket No. 337, at Court request discussing NHPUC regulation].

APPENDIX F

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW HAMPSHIRE

In re:	:	
Public Service Company of New Hampshire,	:	Chapter 11 Case No. 88 00043
Debtor	:	

ORDER CONFIRMING THIRD AMENDED JOINT PLAN OF REORGANIZATION

The Third Amended Joint Plan of Reorganization, dated December 28, 1989 (the "Plan"), proposed by Northeast Utilities Service Company, Public Service Company of New Hampshire, the Official Committee of Unsecured Creditors, the Official Committee of Equity Security Holders, Citicorp, Consolidated Utilities & Communications, Inc. and Shearson Lehman Hutton Inc. (collectively, the "Pro-

ponents")[1], having been filed with this Court by the Proponents on January 2, 1990; and the Third Amended Disclosure Statement of Northeast Utilities Service Company pursuant to Section 1125 of the Bankruptcy Code (including the Plan as an exhibit thereto), dates December 28, 1989 (the "Disclosure Statement"),having been approved by this Court, and transmitted to the Debtor's creditors and equity security holders in accordance with the Court's Order Establishing Disclosure, Voting and Confirmation Procedures, dated January 3, 1990 (the "Scheduling Order") pursuant to Section 1125 of the Bankruptcy Code and Bankruptcy Rule 3017; and April 4, 1990, at 9:30 a.m. having been fixed as the date and time of a hearing (the "Confirmation Hearing") pursuant to

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[1]Capitalized terms used in this Order that are not defined herein shall have the same meaning in this Order that they have in the Plan.

Sections 1128 and 1129 of the Bankruptcy Code to consider confirmation of the Plan; and due notice of the Confirmation Hearing having been given to all creditors and equity security holders of the Debtor and other parties in interest in accordance with the terms of the Scheduling Order; and the Confirmation Hearing having been held commencing on April 4, 1990; and the Court having considered all objections to the confirmation of the Plan; and upon all of the evidence adduced and arguments of counsel made at the Confirmation Hearing and upon the General Findings of Fact and Conclusions of Law Re Plan Confirmation Issues entered separately this date and incorporated herein by reference; and upon other contemporaneous Orders and Memorandum Opinions also specifically incorporated by reference; and after due deliberation, the Court hereby

FINDS, ORDERS, ADJUDGES AND DECREES that:

1. The Plan has been accepted in writing by all classes of creditors and equity security holders of the Debtor impaired under the Plan, except for Class 13.

2. The Plan complies with the applicable provisions of the Bankruptcy Code.

3. The Proponents have complied with the applicable provisions of Chapter 11 of the Bankruptcy Code.

4. The Plan has been proposed in good faith and not by any means forbidden by law.

5. The Plan specifies the classes of claims or interests not impaired under the Plan.

6. The Plan identifies the classes of claims of interests impaired under the Plan and specifies the treatment of claims or interests in such classes.

7. The Plan provides for the same

treatment for each claim or interest of a particular class.

8. The classification of claims and interests under the Plan, as modified by this paragraph, is consistent with Section 1122 of the Bankruptcy Code. The Plan is hereby modified to classify in Class 12 rather than Class 11 all claims against the Debtor for recision of a purchase or sale of, or for damages arising from a purchase or sale of, and Existing PSNH Preferred Stock, or for reimbursement, indemnification, or contribution on account of such claim. Such modification of the Plan is not material, does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder, does not require resolicitation under Sections 1125 or 1127 of the Bankruptcy Code, and should be and hereby is approved and confirmed as part of the Plan.

9. All payments made or to be made by the Proponents or by the Debtor or by a person issuing securities or acquiring property under the Plan, for services or for costs and expenses in or in connection with this case, or in connection with the Plan and incident to this case, have been approved by, or are subject to the approval of, the Court as reasonable.

10. The identity and affiliations of the persons who, after confirmation of the Plan, are to be directors or officers of the Debtor, or will be principally responsible for discharging the obligations of Northeast Utilities Service Company under the Management Services Agreement, have been fully disclosed and the appointment to or continuance in such offices by such individuals is consistent with the interests of creditors and equity security holders and with public policy.

11. The identity of any insider that will be employed or retained by the Debtor after Confirmation of the Plan and the nature of such insider's compensation have been fully disclosed.

12. All rate changes provided for in, or contemplated by, the Plan and the Merger Agreement are expressly conditioned on the approval of any governmental regulatory commissions with jurisdiction, after confirmation of the Plan, over the rates of the Debtor.

13. With respect to each impaired class of claims or interests, each holder of a claim or interest of such class has accepted the Plan or will receive or retain under the Plan on account of such claim or interest property of value, as of the Effective Date of the Plan, that is not less than the amount such holder would receive or retain if the Debtor were liquidated under Chapter 7 of the

Bankruptcy code on such date.

14. Classes 1, 2, 3, 4, 5, 7, 8, 9 and 10A are unimpaired under the Plan.

15. Classes 6, 10, 11, 12 and 13 are impaired under the Plan.

16. Except to the extent that the holder of a Claim of a kind specified in Section 507(a) of the Bankruptcy Code has agreed to a different treatment of such claim, the Plan provides that the holder of each such Claim shall receive on account of such Claim cash equal to the allowed amount of such Claim on the Effective Date of the Plan.

17. Effective as of the Effective Date of the Plan, the Debtor's Articles of Agreement shall be deemed amended by this Order, without further action by any person or entity, to conform to the Amended Articles of Incorporation of Public Service Company of New Hampshire (the "Amended Articles of Incorporation")

provided, however, that the provisions of "Articles VIII, Directors" set forth in Exhibit B annexed hereto and made a part hereof are hereby made effective at 8 a.m., on April 30, 1990, as an amendment to the existing Articles of Agreement and shall continue in effect until the Amended Articles of Incorporation take effect pursuant to this paragraph. The Amended Articles of Incorporation include provisions prohibiting the issuance of non-voting equity securities and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provision for the election of directors representing such preferred class in the event of default in the payment of

such dividends.

18. The Bylaws of the Debtor in effect immediately prior to the entry of this Order are hereby repealed and made null and void, without any further action by any person or entity provided, however, that this Order shall not affect the validity of any action taken pursuant to and in accordance with such Bylaws prior to the entry of this Order. Effective at 8 a.m., on April 30, 1990, the "Bylaws of Public Service Company of New Hampshire" annexed hereto as Exhibit C and made a part hereof are hereby adopted as the Bylaws of the Debtor, without further action by any person or entity.

19. Without further action by any person or entity, all directors of the Debtor who were in office immediately prior to the entry of this Order are hereby deemed to have resigned upon the entry of this Order, such resignations to

become effective at 8 a.m., April 30, 1990; and effective at 8 a.m. on April 30, 1990, the number of directorships in the Debtor is hereby fixed at seven (7) until the occurrence of the Merger and the following individuals are hereby made directors of the Debtor:

Joseph P. Tyrrell (Chairman)
241 Bristol Road
Wellesley Hills, MA 0218

James D. Neidhart
Equitable Life Assurance Society
c/o Equitable Capital Management Corp.
1285 Avenue of the Americas
New York, NY 10019

Nowell A. Blake
Mutual Benefit Life Insurance Company
520 Broad Street
Newark, NJ 07102-3814

Stephen Davis
IBJ Schroder Bank & Trust Company
One State Street
New York, NY 10004

Anthony Ben Walsh
3 Sheridan Square
New York, NY 10014

James K. Arthur
Certified Reporting Co.
933 North Glenayre Drive
Glenview, IL 60025

Douglas A. Barry
Monarch Life Insurance Co.
c/o Amherst Investment Management Co.
1414 Main Street
Springfield, MA 01144

Nothing set forth herein shall prevent any of the foregoing individuals from resigning as a director of the Debtor at any time, without further order of this Court. In the event that a vacancy in the Board of Directors occurs for any reason, such vacancy shall be filled in accordance with the Bylaws adopted by this order, as the same may hereafter be amended.

20. At least one class of claims that is impaired under the Plan has accepted the Plan, det4ermined without including any acceptance of the Plan by any insider.

21. The Plan is feasible and confirmation of the Plan is not likely to be followed by the liquidation or the need for further financial reorganization of

the Debtor.

22. All fees payable under Section 1930 of Title 28 of the United States Code have been paid or will be paid on or prior to the Effective Date of the Plan.

23. The reorganization Debtor will continue after the Effective Date of the Plan to make payment of retiree benefits, as that term is defined in Section 1114 of the Bankruptcy Coded, in accordance with the terms of any retiree benefit plans of the Debtor, within the meaning of such Section 1114, as are in effect on the date of this Order, except to the extent that any such retiree benefit plan is hereafter modified or amended by agreement or in accordance with applicable non-bankruptcy law.

24. The Plan does not discriminate unfairly against and is fair and equitable with respect to Class 13 and meets the requirements of Section 1129(b) of

the Bankruptcy Code with respect to Class 13.

25. The primary purpose of the Plan is not the avoidance of taxes or the avoidance of the requirements of Section 5 of the Securities Act of 1933.

26. The Reorganized PSNH Common Stock, the Contingent Notes, the Contingent Warrant Certificates, the NU Warrants, any NU common shares issued pursuant to the exercise of an NU Warrant, and any Reorganized PSNH first mortgage bonds issued to evidence and secure the Debtor's obligations under the 10 1/2 % Pollution Control Revenue Bonds issued in 1989 in the event that they remain outstanding after the Effective Date, all of which are to be issued pursuant to the Plan, shall be issued in exchange for claims against or interests in the Debtor within the meaning of Section 1145 of the Bankruptcy Code. Pursuant to Section

1145 of the Bankruptcy Code, the Debtor and, as applicable, NU are exempt from the registration requirements of the Securities Act of 1933, as amended, and any state or local law requiring registration for the offer or sale of a security; all of the securities to be issued pursuant to the Plan or on conversion or exercise of rights under such securities issued pursuant tot he Plan, when issued, shall be freely transferable by the recipients thereof, subject to: (a) the provisions of Section 1145(b)(1) of the Bankruptcy Code relating to the definition of an underwriter in Section 2(11) of the Securities Act of 1933, as amended, and compliance with rules and regulations of the Securities and Exchange Commission, if any, applicable at the time of any future transfer of such securities; (b) any restriction contained in the terms of such securities themselves;

and (c) any restriction on such securities which has been agreed to by the holder of such securities with respect to his securities.

27. Each of the conditions to Confirmation set forth in Section VIII.A of the Plan has been satisfied.

28. Each of the Objections to Confirmation that have filed is hereby overruled. This includes, without limitation, the Objection of Harry Saxon, a preferred stockholder, pursuant to Paragraph 35 of the General Findings and Conclusions; the Objection filed by allen M. Rideout, a common stockholder, pursuant to Paragraph 50 of the General Findings and conclusions; the Objection filed by Midlantic National Bank on the "OID" issue, pursuant to Paragraph 51 of the General Findings and Conclusions; the Objections of the Bank of New England, N.A., and the Maryland National Bank, on

the "prepayment premium" issue, pursuant to Paragraph 52 of the General Findings and Conclusions. This also includes without limitation the Objections filed by the common stockholders, Martin Rochman, Edward Kaufman, and Robert Richards ("RKR"), referred to in Paragraph 69 of the General Findings and Conclusions, contending that greater value could be realized for stockholders by a litigated rate case before the New Hampshire Public Utilities commission as opposed to the compromise embodied in the Rate Agreement under the Plan. The credible evidence, however, supports a finding that PSNH would not recover substantially more under a traditional rate case than it would under the Plan because it is unlikely PSNH would recover significantly higher rates under a rate case. Even if PSNH were successful in obtaining higher rates, the impact of such rate hikes

would likely lead to a loss of customers and loss of net revenue to PSNH, and ultimately to a lower return than that proposed under the Plan. Moreover, the expectable delay of approximately three years in obtaining the action by the NHPUC and the N.H. Supreme Court, with interest and other charges accruing to superior classes at approximately $176 million per year makes it even more unlikely that rate increases of a magnitude sufficient to overcome this "additional hurdle" to getting value down to the common could be achieved. The sum total of the evidence before the Court on this issue supports a finding --- here made --- that the rate increase results under the Rate Agreement represents a fair and equitable settlement and compromise well within the range of results reasonably expectable in a litigated rate case. The RKR Objection contending that a rate case

would result in more value for the Debtor than that proposed under the Plan is hereby denied for the reasons set forth above. A separate Memorandum Opinion giving amplified findings and conclusions in support of this determination will be filed.

29. The Plan is hereby confirmed.

30. The Rate Agreement is fair, reasonable, consistent with public policy and the public interest and is in the best interests of creditors and equity security holders of the Debtor. Upon approval of the NHPUC, the Rate Agreement shall be binding on the Plan Proponents and, on and after the Effective Date, binding on reorganized PSNH.

31. The Management Services Agreement is fair, reasonable, consistent with public policy and the public interest and is in the best interests of creditors and equity security holders of the Debtor.

32. The Merger Agreement is fair, reasonable, consistent with public policy and the public interest and is in the best interests of creditors and equity security holders of the Debtor and is hereby approved and made binding on the Debtor, Northeast Utilities, Northeast Utilities Service Company, and NU Acquisition Corp. in accordance with its terms, without the need for further action by any person or entity.

33. the provisions of the Plan are hereby made binding upon the Debtor, any entity issuing securities under the Plan, any entity acquiring property under the Plan, any creditor or equity security holder of the Debtor, whether or not the claim or interest of such creditor or equity security holder is impaired under the Plan and whether or not such creditor or equity security holder has accepted the Plan, and in the unique circumstances

of this case upon all parties in interest who have been actively involved in the formulation of the Plan in this case.

34. Except as otherwise provided herein or in the Plan, and effective as of the Effective Date of the Plan, in accordance with Section 1141(d) of the Bankruptcy Coded, the Debtor is hereby discharged of and from any and all debts and Claims that arose against it before the date of entry of this Order, including, without limitation, any debt or claim of a kind specified in Sections 502(g), 502(h) or 502(i) of the Bankruptcy Code, whether or not (i) a proof of claim based on such a debt is filed or deemed filed under Section 501 of the Bankruptcy Code, (ii) such claim is allowed under Section 502 of the Bankruptcy code, or (iii) the holder of such claim has accepted the Plan.

35. Except as otherwise provided

herein or in the Plan, and effective as of the Effective Date of the Plan, in accordance with Section VII.B.7 of the Plan and Section 1141(d) of the Bankruptcy Code, all debt securities (except the 10 1/2 % Pollution Control Revenue Bonds and the variable rate Pollution Control Revenue Bonds issued in 1989, unless such bonds are refunded in accordance with the Plan), including without limitation the General and Refunding Mortgage Bonds issued pursuant to the Court's "Order Authorizing Public Service to: (A) Obtain Credit Pursuant to 11 U.S.C. §364(d); (B) Satisfy Series "E" of the General and Refunding Mortgage Bonds; (c) Retain Bear, Stearns & Co. Inc. in connection Therewith; and To Pay Related Expenses," entered August 11, 1989 [Docket No. 2380] and all equity securities of the Debtor issued at any time prior to the date hereof, and all indentures and agreements

heretofore binding upon the Debtor or its assets which pertain to any such debt securities or equity securities (including the indenture for the General and Refunding Mortgage Bonds unless such indenture is modified in accordance with the Plan) are hereby deemed void, cancelled and of no further force or effect.

36. Except as otherwise provided in the Plan, on the Effective Date of the Plan, in accordance with Sections 1141(b) and 1141(c) of the Bankruptcy Code, all property of the Debtor's estate and all other property dealt with by the Plan is hereby vested in the Debtor free and clear of all claims and interests of creditors and equity security holders of the Debtor.

37. Except as provided in the Plan and subject only to the occurrence of the Effective Date of the Plan, any judgment at any time obtained, to the extent that

such judgment is a determination of the liability of the Debtor with respect to any debt or claim discharged hereunder, is hereby rendered null and void.

38. Effective as of the Effective Date of the Plan, the commencement or continuation of any action, the employment of process or any act to collect, recover or offset any claim discharged or interest terminated hereunder is hereby permanently enjoined, stayed and restrained.

39. Pursuant to Sections 1123(b) and 1141(a) of the Bankruptcy Code and Section VII.B.11 of the Plan, upon the Effective Date, any and all claims, actions, suits or liabilities of any kind or nature which were or could have been asserted by or in the name of the Debtor, the Debtor-in-Possession or the Estate prior to the entry of this Order against any person (and His or her heirs) who was

a director or officer of the Debtor prior to the entry of this Order are hereby released and discharged.

40. Pursuant to Sections 1123 (b) and 1141(a) of the Bankruptcy Code and Section VII.B.12 of the Plan, upon the Effective Date, any and all claims, actions, suits or liabilities of any kind or nature which were or could have been asserted by or in the name of any holder of a Claim against or Interest in the Debtor prior to the entry of this Order against any person (and his or her heirs) who was a director or officer of the Debtor at any time prior to the entry of this Order are hereby released and discharged.

42. In accordance with Section VI.A of the Plan, the List of Assumed Contracts dated March 9, 1990 filed pursuant thereto, and Section 365 of the Bankruptcy Code, the assumption of all executory

contracts and unexpired leases of the Debtor as to which (a) no objection to the assumption thereof has been filed with the Court and not resolved as of the date of this Order, and (b) no other stipulation is in effect, is hereby approved in all respects, provided, however, that in accordance with Section VII.C.6 of the Plan, the Court shall retain jurisdiction to determine any dispute as to the amount of the defaults, if any, required to be cured under Section 365(b)(1) of the Bankruptcy Coded with respect to any such executory contract or unexpired lease, or any other dispute relating to assumption of any executory contract or unexpired lease pursuant to the Plan.

42. In accordance with Section VI.C of the Plan, the list of Rejected Contracts dated March 9, 1990 filed pursuant thereto and Section 365 of the Bankruptcy

Code, the rejection of all executory contracts and unexpired leases of the Debtor set forth on the List of Rejected Contracts is hereby approved in all respects, provided, however, that in accordance with Section VII.C.6 of the Plan, the Court shall retain jurisdiction to determine any dispute as to any claim resulting from such rejection, and any other dispute relating thereto.

43. The Court shall retain jurisdiction of this case in accordance with Section VII.C.6 of the Plan and Section 1142 of the Bankruptcy Code.

44. Notwithstanding anything to the contrary set forth in the Plan, all applications for final compensation of professional persons for services rendered prior to Confirmation, all claims for fees and expenses asserted as par of any Allowed Claim, and all other requests for payment of administrative costs and

expenses incurred prior to Confirmation pursuant to Sections 507(a)(1) or 507(b) of the Bankruptcy Code (except claims of Chemical Bank arising under or pursuant to the terms of the revolving credit agreement entered into with the Debtor during the Reorganization Case and claims for taxes, trade debt and customer deposits and credits incurred in the ordinary course of business) shall be filed no later than sixty (60) days after service of this Order on the Full List pursuant to paragraph 48 hereof. Any such claim which is not filed within this time deadline shall be forever barred. This paragraph shall not affect the entitlement of any professional person to seek compensation for services rendered after Confirmation and prior to the Effective Date and in connection with consummating the transactions which occur on the Effective Date, nor shall it limit their right to

seek such interim allowances of compensation as may hereafter be allowed by the Court. All final applications for compensation for such services shall be filed no later than sixty (60) days after the Effective Date or be forever barred.

45. All objections to the allowance of claims or interests shall be filed prior to the Effective Date.

46. Except as otherwise provided in this Order, no payment provided for in the Plan shall be made prior to the Effective Date.

47. The Debtor is hereby authorized and empowered to issue execute, deliver, file or record any document, and to take any action necessary to appropriate to implement, effectuate and consummate the Plan in accordance with its terms, including, without limitation, any release, agreement of indemnity, by-law or charter amendment, whether or not specifically

referred to in the Plan or any exhibit thereto and without further application to or order of this Court.

48. The Debtor shall promptly serve (i) a copy of this Order on all parties on the Full List; and (ii) notice of the entry of this Order pursuant to Bankruptcy Rules 2002(f)(8) and 3020(c) on all creditors, equity security holders, indenture trustees and other parties in interest. The record date for purposes of determining holders of publicly traded securities entitled to such notice shall be the date of entry of this Order.

DONE and ORDERED at Manchester, New Hampshire this 20th day of April, 1990.

J. E. Yacos
JAMES E. YACOS
BANKRUPTCY JUDGE

Debtor to serve Full List

EXHIBIT A

AMENDED ARTICLES OF INCORPORATION OF

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

[OMITTED]

EXHIBIT B

ARTICLE VIII

DIRECTORS

[OMITTED]

EXHIBIT C

BY-LAWS OF

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

[OMITTED]

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:	:	
Public Service Company of New Hampshire,	:	Chapter 11
	:	Case No. 88 00043
Debtor	:	

GENERAL FINDINGS OF FACT AND CONCLUSIONS OF LAW RE PLAN CONFIRMATION ISSUES

The following constitute general findings of fact and conclusions of law regarding confirmation of the Third Amended Joint Plan of Reorganization, dated December 28, 1989 ("Plan") propcsed by Northeast Utilities Service company ("NUSCO"), Public Service Company of New Hampshire ("PSNH" or "Debtor"), the Official Committee of Unsecured Creditors, the Official Committee of Equity Security Holders (collectively, the "Committees"), Citicorp, Consolidated Utilities & Communications, Inc., and Shearson Lehman

Hutton Inc. Additional specific findings and conclusions are set forth separately in the Order Confirming Plan of Reorganization entered this date and separate Memorandum Opinions with regard to the objections to confirmation of the plan of reorganization by the Midlantic National Bank ("Midlantic"), the Bank of New England ("BNE"), N.A., the Maryland National Bank ("MNB"), and by Martin Rochman, Edward Kaufman, and Robert Richards ("RKR"), three common shareholders of the debtor.

I Introduction

1. PSNH, incorporated in 1926 under the laws of the State of New Hampshire, is the largest electric utility in New Hampshire. It operates a single integrated system which supplies electricity to approximately three-quarters of the state's population. PSNH distributes and sells electricity at retail to approxi-

mately 200 cities and towns in the state of New Hampshire, including Manchester, Nashua, Portsmouth, Berlin, Keene, Laconia and Rochester. It also sells electricity to five other utilities and municipalities. (Disclosure Statement at 11).

2. PSNH is currently the owner of the largest interest in the Seabrook nuclear power plant ("Seabrook") located in Seabrook, New Hampshire. PSNH owns approximately 36% of Seabrook with the balance owned by 11 other joint owners. (Disclosure Statement at 14).

3. PSNH's financial predicament, which led to the commencement of a voluntary reorganization case under Chapter 11 of the Bankruptcy Code, is attributable to several factors, including the magnitude of its investment in Seabrook (approximately two thirds of the book value of PSNH's assets), the prohibition

under New Hampshire law of the realization from Seabrook of any cash income from or return of that investment until Seabrook provided service to customers, and delays in obtaining nuclear regulatory commission approval for Seabrook operation. (Disclosure Statement at 15).

4. The process of obtaining approvals and permits for Seabrook was long, complex, consistently opposed by a number of intervening groups, and plagued by lengthy delays. These factors resulted in greatly increased costs for Seabrook. Although construction of Seabrook was completed in 1986, political opposition to Seabrook delayed completion of the licensing process and commercial operation until Spring of 1990. These factors resulted in greatly increased costs for Seabrook. (Disclosure Statement at 14-15).

5. During the pendency of this Chap-

ter 11 reorganization case, PSNH has functioned as debtor in possession pursuant to Sections 1107 and 1108 of the Bankruptcy Coded and has continued to operate its business substantially as before the filing of the petition. (Disclosure Statement at 17).

6. The Debtor sought and obtained extensions of its exclusive period under the Bankruptcy Code to file a plan and solicit acceptances until December 27, 1988 and February 27, 1989, respectively. On March 16, 1989 this Court denied the Debtor's motion for a second extension of time, and permitted any party in interest to file a plan. The Court suspended the right of any party to file a plan other than a consensual plan, however, for sixty days and subsequently renewed that suspension until September 15, 1989. (Disclosure Statement at 17).

7. The negotiations culminating in

the proposal of this Plan have been long and complex. At various times, plans proposed by PSNH, the Creditors Committee, NU, the United Illuminating Company and New England Electric System have been before this Court. (Disclosure Statement at 23).

8. By Order dated March 16, 1989, this Court ordered the appointment of an examiner in this case with various duties including: (a) to inquire of various parties as to their positions and negotiations and to mediate any differences that existed; (b) to report to the court regarding the status of negotiations; and (c) to aid the court in understanding the more technical aspects of regulatory requirements and rate structures as necessary. On April 3, 1989, this Court approved the appointment of Paul Gioia, a former Chairman of the New York State

Public Service commission, as examiner.[1] The examiner filed his initial report with this Court on May 15, 1989, and his second report on July 29, 1989, in which he detailed his activities and indicated his belief that a total company value of $2.2 billion appeared to be a reasonable basis for a consensual settlement. (Disclosure Statement at 19).

9. The State of New Hampshire (the "State") has been actively involved in this case since the petition date. The interest of the State has been expressed as the assurance of an adequate source of

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[1]Mr. Gioia served as Chairman of the New York State Public Service Commission from April 1981 to February of 1987. Mr. Gioia formally served on the legal staffs of Governors Rockefeller, Wilson and Carey of New York, and is a special assistant to U.S. Senator Jacob K. Javits. While on the NYPSC he was involved intensively with the developing controversy as to the coming on line of the Shoreham nuclear power plant which had been completed by the Long Island Lighting Company, but had been opposed for an operating license by various citizen groups.

electric power for its residents at reasonable rates. By decision and order entered June 22, 1988, this Court granted the State of New Hampshire explicit party-in-interest status within the meaning of § 1109(b) of the Bankruptcy Code and also authorized the state to intervene generally in these proceedings pursuant to Bankruptcy Rule 2018(a). See In re Public Service Company of New Hampshire, 88 B.R. 546 (Bankr. D.N.H. 1988). The State has negotiated with the principal parties in this case concerning the level of rates which the Debtor may charge New Hampshire ratepayers after confirmation of a plan. (Disclosure Statement at 19).

10. Extensive negotiations among the various parties in interest to this case with regard to the various plan proposals put forth by said parties culminated in the filing on December 28, 1989, of the Third Amended Disclosure Statement of

Northeast Utilities Service Company in connection with the Third Amended Joint Plan of Reorganization proposed by NU, PSNH, the Official Committee of Unsecured Creditors, the Official Committee of Equity Security Holders, Citicorp, Consolidated Utilities & communications, Inc. and Shearson Lehman Hutton Inc., which Plan is the subject of these confirmation hearings.

II. Confirmation Standards

A. 1129(a)(1)[2]

11. The plan complies with the applicable provisions of Chapter 11 of the United States Bankruptcy Code as set forth more fully below.

12. PSNH is a corporation organized under the laws of the State of New Hampshire and is a proper debtor under Sec-

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[2]All section references are to Title 11 of the United States Code unless otherwise indicated.

tion 109.

13. On January 28, 1988, PSNH filed a Chapter 11 petition pursuant to Section 301.

14. This court has jurisdiction over this matter pursuant to 28 U.S.C. Section 1334.

15. Venue of this Chapter 11 case is properly in this district pursuant to 28 U.S.C. Sections 1408 and 1409.

16. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(L).

17. The proponents of this Plan are parties in interest and, therefore, proper proponents of the Plan pursuant to Section 1121(c).

18. After notice and a hearing commencing on November 13, 1989, and continuing through December 28, 1989, on NUSCO's Third Amended Disclosure Statement this Court, pursuant to Section 1125 and Bankruptcy Rules 3016 and 3017, on

January 3, 1990, issued an Order Approving Disclosure Statement and Fixing Time for Filing Any Acceptances or Rejections of Plan, and Objections to the Confirmation of the Plan, and Scheduling Confirmation of the Plan. No appeal was taken from that order.

19. On or before January 19, 1990, the Proponents duly mailed by first - class mail, postage prepaid, copies of the Court's notice, the Disclosure Statement, annexed to which was a copy of the Plan, a ballot for acceptance or rejection of the Plan, an instruction sheet for voting on the Plan, a transmittal letter from William Ellis and John Duffett, the Chief Executive Officers of Northeast Utilities and the Debtor, respectively, and a return envelope for the ballot, to all creditors and all secured equity security holders of the Debtor of record on November 27, 1989.

20. The Proponents further caused to be published a notice in accordance with this Court's Order of January 3, 1990, summarizing said Order, and setting forth the deadlines for voting on the Plan and filing objections thereto as well as the address and telephone number from which solicitation packages could be obtained and the address to which ballots were to be mailed. Said notice was published at least twice in the: a) Wall Street Journal (National Edition); b) The Bond Buyer; c) The Manchester Union Leader; d) The Boston Globe; and e) The New York Times.

21. Any person required to receive notice of the hearings on the adequacy of the Disclosure Statement and confirmation of the Plan has received due, proper and adequate notice thereof.

22. All persons having an interest, vested or contingent, present or future,

to the extent such persons can be presently identified, received a copy of the above-referenced materials or had due, proper, and adequate notice of this confirmation hearing.

23. Due, proper, and adequate notice, and an opportunity to appear, was given to all persons with any claim against or interest in the Debtor.

24 (1123(a)(1)). The Plan provides for 14 classes of claims and interests:

Class 1 consists of the first mortgage bondholders, with secured claims against the Debtor under or evidenced by the first mortgage bonds or the indenture therefore;

Class 2 consists of secured claims against the Debtor under or evidenced by the general and refunding mortgage bonds or the indenture therefor;

Class 3 consists of secured claims against the Debtor under or evidenced by

the nuclear material lease;

Class 4 consists of secured claims against the Debtor under or evidenced by the Eurodollar Term Loan Agreement or the Domestic Term Loan Agreement;

Class 5 consists of secured claims against the Debtor under or evidenced by the Series A third Mortgage Bonds or the indenture therefore;

Class 6 consists of secured claims against the Debtor arising on account of the obligation of the Debtor under the 10 1/2 percent pollution control bond indenture;

Class 7 consists of secured claims against the Debtor for taxes and all other secured claims against the Debtor which were not included in any Classes 1-6;

Class 8 consists of all claims against the Debtor which are specified as having priority in Section 507(a)(3),

(a)(4), (a)(r), and (a)(6), respectively;

Class 9 consists of every non-priority claim against the Debtor for customer deposits or consumer credits;

Class 10 consists of every unsecured claim against the Debtor that is not in any of Classes 8, 9, 10A or 11-13 inclusive;

Class 10A consists of all non-priority unsecured claims, the petition date amount of which is $900 or less, or has been reduced to $900 at the election of the holder which would otherwise have been classified as Class 10;

Class 11, as modified by the Confirmation Order, consists of interest of holders of existing PSNH preferred stock;

Class 12 consists of interests of holders of existing PSNH common stock, all claims against the Debtor for rescission of a purchase or sale of, or for damages arising from a purchase or sale

of, and Existing PSNH Preferred Stock, or for reimbursement, indemnification or contribution on account of any such claim, and all claims against the Debtor for rescission of a purchase or sale of, or for damages arising from a purchase or sale of, any Existing PSNH Common Stock, or for reimbursement, indemnification or contribution on account of any such claim; and

Class 13 consists of interests of holders of PSNH warrants and all claims against the Debtor arising out of the warrants, including without limitation all claims arising out of the rejection of warrants to the extent, if any, they constitute executory contracts and all claims against the Debtor for rescission of a purchase or sale, or for damages arising from a purchase or sale of, any warrant, or for reimbursement, indemnification or contribution on account of any

such claim. (Plan at Section III).

25. The general rule regarding classification is that all creditors of equal rank with claims against the same property should be placed in the same class. Separate classifications for unsecured creditors are only justified where the legal character of their claims is such as to accord them with status different from the unsecured creditors. Granada Wines v. New England Teamsters and Trucking, 748 F. 2d 42, 46 (1st Cir. 1984).

26. The classification of claims or interests set forth in the Plan as modified by the Confirmation Order is appropriate under Section 1122. The Plan has been modified to classify in Class 12 rather than Class 11 all claims against the Debtor for rescission of a purchase or sale of, or for damage arising from a purchase or sale of, any existing PSNH Preferred Stock, or for reimbursement,

indemnification or contribution on account of such claim. Such modification of the Plan is not material, does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder, does not require resolicitation under Section 1125 or 1127 of the Bankruptcy Code, and should be and will be approved as part of the confirmed Plan.

27. The claims or interests placed in a particular class pursuant to the Plan are substantially similar to the other claims or interests in such class.

28. The unsecured claims which are less than or reduced to the amount of $900 and have been placed in Class 10A is reasonable and necessary for administrative convenience pursuant to Section 1122(b).

29. The separate classification of Class 9 customer deposits or customer

credits is justified because the legal character of these claims is such as to accord them a status different from the other unsecured creditors in that, because of the exigencies of PSNH's status as a regulated public utility, they will be paid or refunded in the ordinary course of the Debtor's business and not necessarily upon the Effective Date of the Plan.

30. The separate classification of priority unsecured claims is justified because these claims are entitled to a different legal status than the other unsecured claims pursuant to Section 507(a).

31. (Section 1123(a)(2)). The following classes of claims or interests are not impaired under the Plan. Class 1, Class 2, Class 3, Class 4, Class 5, Class 7, Class 8, Class 9 and Class 10A. (Plan at Section IV, Part C, D)

32. Regarding the contention by BNE and MNB that Classes 1 and 2 impaired, by virtue of the nonallowance of prepayment premiums under the Plan, which contention has been rejected by the Court, it is noted that nevertheless the members of said classes have voted to accept the Plan, and each holder will receive on the Effective Date of the Plan not less than they would have received in a Chapter 7 liquidation. Reference is made to the separate provisions in the Order confirming plan of reorganization entered this date in that regard, and the supporting Memorandum Opinion also entered separately this date.

33. (1123(a)(3)). The impaired classes under the Plan are treated as follows:

(a) Each holder of an Allowed Claim in Class 6 shall receive an amount in cash equal to such holder's allowed

claims for pre-petition date interest, post-petition date interest and interest on interest at the rates specified in the bonds. In addition, each Allowed Claim in Class 6 for fees and expenses under the indenture of the 10 1/2 % Pollution Control Revenue Bonds shall be paid in full in cash;

(b) Each holder of an Allowed Claim in Class 10 shall receive his pro-rata share of $545 million (less the amount of allowed claims in Class 10A) in cash and the number of shares of Reorganized PSNH Common Stock determined by the formula set forth in Section IV, Part D of the Plan;

(c) Each holder of an Allowed Claim or Interest in Class 11 and Class 12 shall receive his pro-rata share of Reorganized PSNH common stock and contingent notes and contingent warrant certificates as set forth more fully in Section IV,

Part E of the Plan.

(d) The holders of allowed claims and Interests in Class 13 shall receive in the aggregate a cash payment of Ten Cents per Warrant. (Plan at Section IV, Part E).

34. (1123(a)(4)). The Plan provides the same treatment for each class or claim in a particular class by providing for equal treatment of each member of each particular class, unless the holder of a particular claim or interest agrees to less favorable treatment of such particular claim or interest.

35. Harry Saxon, a holder of PSNH preferred stock, has filed an objection to confirmation alleging that the Plan unfairly discriminates against $25 par value preferred shareholders when compared to the treatment of $100 par value preferred shareholders. That objection is without merit. The Plan provides for

payment to preferred shareholders on the basis of the par value of their stock, and disregards accrued but unpaid dividends. The fact that some preferred shareholders are giving up more dividends than others, or that the market prices for the preferred stock may not have reflected the differences in the par value, does not warrant a finding that the Plan discriminates against some shareholders. To the extent compromises were reached in the treatment of preferred shareholders, these compromises were reached and approved by the Equity Committee and overwhelmingly accepted by preferred shareholders. These compromises in fact were part of the "give-ups" negotiated to allow value to get down to the common shareholder class as part of achieving a consensual plan of reorganization. The fact that similar treatment may lead to different rates of return for

some shareholders does not change the fact that they are all treated similarly under the Plan. Mr. Saxon's Objection is hereby denied.

36. (1123(a)(5)). The Plan provides adequate means for the Plan's implementation. The Plan provides for the acquisition of PSNH by merger into an NU subsidiary in accordance with a Merger Agreement, attached to the Plan as Exhibit B, upon the occurrence of certain conditions which are set forth more fully in the Plan. On the confirmation date, all directors of the Debtor shall be deemed to have resigned and the board of directors of Reorganized PSNH will consist of seven members, of which three will be designated by the Creditors Committee, three will be designated by the Equity Committee, and one will be designated jointly by the Committees. (Plan Section VII, Part A). The Debtor's business shall be managed in

accordance with the transitional management plan which, to the extent permitted by law, will provide for management of the Debtor's business by NUSCO pursuant to the Management Services Agreement attached to the Plan as Exhibit B. (Plan at Section VII, Part C). The Court has previously entered its Order Approving the Transitional Management Plan to become effective and implemented on April 30, 1990, subject to the entry prior to that time of an order confirming Plan of Reorganization in this case.

37. NU will make approximately $2.3 billion in cash and securities available for creditors and equity security holders of PSNH upon the Effective Date of the Plan. The cash portion of the distribution will be obtained by the issuance of debt and preferred equity securities by PSNH and through bank loans. The final terms for the financing required under

the Plan are currently under negotiation and virtually complete. The Proponents and their financial advisors are highly confident that the financial arrangements necessary for the implementation of the Plan will be obtained.

38. Upon confirmation the Plan will not be implemented immediately. Instead the Effective Date will not occur until various conditions described in more detail in the Plan are satisfied or waived. On the Effective Date, the existing PSNH debt securities and equity securities shall be deemed cancelled and the holders of such securities will receive distributions as more fully set forth in the Plan.

39. The conditions to confirmation set forth in Section VIII, Part A of the Plan have occurred.

40. (1123(a)(6)). The Plan restricts the issuance of non-voting equity securi-

ties in accordance with Section 1123(a)(6). The shareholders' vote is on the basis of one vote per share of stock, as set forth in Article 4, Section 6 of the by-laws of Public Service Company of New Hampshire, which were presented at this confirmation hearing.

41. (1123(a)(7)). The Plan provides for the selection of directors of Reorganized PSNH by designation by the Committees, and for the selection of officers of Reorganized PSNH by said directors. (Plan at Section VII, Part A). Those provisions are consistent with the interests of creditors and equity security holders and with public policy, with respect to the manner of selection of any officer or director.

42. (1123(b)(2)). The Plan provides for the rejection of certain specified contracts and leases as set forth in the Plan at Section VI, Part A and the as-

sumption of the remainder. (Plan at Section IV, Part C).

43. The Plan complies with Bankruptcy Rule 3016 (b) and Local Rules 44(a) and 44(c), with regard to form.

44. The Plan provides that the United States Bankruptcy Court shall retain jurisdiction over matters which are necessary to effectuate and consummate the Plan in accordance with Section 1142 and Bankruptcy Rule 3020(d).

B. 1129(a)(2).

45. The Proponents of the Plan have complied with the applicable provisions of Chapter 11, including the following:

46. The Proponents filed a Plan under Section 1121, which properly classified claims or interest under Section 1122, embodying the concepts required by Sections 1123 and 1124.

47. The Proponents have engaged in post-petition disclosure and solicitation

in good faith and in compliance with the applicable provisions of Section 1125. The RKR group raised objections in this regard during the first day of confirmation hearings, on April 4, 1990, resulting in an oral ruling by the Court dictated in the record that date overruling those objections. That oral ruling is incorporated herein by reference.

48. The Proponents have presented testimony at the confirmation hearing pursuant to Section 1128.

C. 1129(a)(3)

49. The Plan has been proposed in good faith and not by any means forbidden by law. There have been no objections on that issue and, therefore, pursuant to Bankruptcy Rule 3020(b)(2) the court need not receive evidence on the issue. Notwithstanding, however, testimony of Robert Busch from NU establishes that the purpose of the Reorganization Plan is to

reorganize PSNH as an ongoing utility able to pay its obligations. The good faith standard requires that the reorganization plan bear some relation to the statutory objective of resuscitating a financially troubled corporation. In Re Coastal Cable T.V. Inc., 709 F. 2d 762, 765 (1st Cir. 1983). The Proponents have established that the purpose of the Plan meets that objective.

50. The Rideout Objection that this bankruptcy is fraudulent because the management of PSNH went willingly into bankruptcy is without merit. The Debtor was a financially troubled entity and its exercise of its right to file bankruptcy was not "fraudulent". The remaining contentions with regard to the unconstitutionality of the anti-CWIP law and the lack of representation for PSNH owners also lack legally relevant substance. The Equity Committee has been available

at all times for input and suggestions by shareholders, and the procedures and hearings employed in this reorganization proceeding have provided ample opportunity for comment and/or objections by shareholders as the Plan was being formulated. The constitutionality of the anti-CWIP law was challenged by PSNH prior to the Chapter 11 filing and the Supreme Court of the State of New Hampshire upheld the law against that constitutional challenge in Petition of Public Service of New Hampshire, ____ U.S.____, 109 S. Ct. 858 (1989). The Rideout Objection should be denied and the confirming order entered separately this date so provides.

51. The Midlantic National Bank ("Midlantic") objection to confirmation because the Plan disallows claims for unamortized original issue discount ("OID") has been dealt with separately in

the Memorandum Opinion on "OID" Issue entered on April 13, 1990, which concluded Midlantic's objection to confirmation of the Plan on this ground should be denied, and the confirming order entered separately this date so provides.

52. The Bank of New England, N.A. and Maryland National Bank ("Indenture Trustees") as indenture trustees for the Debtor's first and second mortgage bonds (Classes 1 and 2) have objected to the confirmation of the Plan on the grounds that it does not pay bondholders' claims for prepayment premiums provided for in their indentures. BNE also objects on the ground that the Plan proposes to pay claims for interest on interest at the non-default contract rate rather than the default rate provided for in the indenture. Classes 1 and 2 have been classified as not impaired under the Plan. Notwithstanding, however, Classes 1 and 2

were solicited under the Plan. Of those who responded, 99% voted in favor of the Plan. The Court has dealt with the objections regarding the claims for prepayment premiums in its separate Memorandum Opinion entered this date, concluding that the objections on those grounds should be denied, and the confirming order entered separately so provides. With regard to the "default rate interest" issue raised by BANE, that matter involves a total sum of $5,200. the debtor was orally instructed at the confirmation hearing, when this issue was raised, to place the sum of $5,200 in an interest-bearing escrow account until such time as the Court can rule on this difficult question of reorganization law. Cf. In re W. S. Sheppley & Co., 62 B.R. 271 (Bankr. N.D. Iowa 1986); but see Debentureholders Committee v. Continental Investment Corp., 679 F. 2d 264 (1st

Cir.) cert. denied 459 U.S. 894 (1982). This procedure with the small amount involved will not materially effect the Plan or its confirmation.

D. 1129(a)(4)

53. Section 1129(a)(4) requires disclosure and approval of any payments made or to be made by the Proponents of the Plan, the Debtor, or any person issuing securities or acquiring property under the plan for costs and expenses incurred in connection with the bankruptcy case. Exhibit H to the Disclosure Statement sets forth the fees and expenses incurred by the professionals retained by order of the court through October 31, 1989. These fees were found to be reasonable as interim compensation but are subject to further court review for reasonableness in conjunction with the final fee awards to be made in this case.

54. The payments made or to be made

by NU for the fees and expenses incurred by the State of New Hampshire and the Third Mortgage Bondholders in connection with this bankruptcy are subject to court review for reasonableness.

55. The payments by NU to its counsel and its other bankruptcy-related advisors in connection with this bankruptcy will be subject to this Court's review by their express agreement. This renders unnecessary any decision as to whether they are otherwise subject to such review by applicable law.

E. 1129(a)(5)

56. The court finds the appointment of the proposed directors and officers of the Reorganized Debtor to be consistent with the interests of the creditors and equity security holders and with public policy.

57. This court further approves the employment or retention by the Reorga-

nized Debtor of all insiders whose identity and compensation were disclosed at this confirmation hearing.

F. 1129(a)(6)

58. As a public utility, the Debtor is subject to regulatory approvals by a variety of governmental entities. The Plan explicitly provides that it will not be implemented until regulatory approvals by the New Hampshire Public Utilities Commission (NHPUC), the Federal Energy Regulatory Commission (FERC), and the Connecticut Department of Public Utility Control (CDPUC), as well as any other necessary approvals, are obtained. Plan Section VIII, Part B. The Court notes that although those approvals have not yet been obtained, there was credible testimony at the confirmation hearing that there is every expectation that they will be obtained.

59. The State of Connecticut has

filed a Statement in Lieu of Objection that the CDPUC has not issued its approval. The Plan is expressly conditioned upon obtaining all necessary approvals, however, and therefore Section 1129(a)(6) is satisfied.

G. 1129(a)(7)

60. Acceptance of the Plan by the impaired classes has not been unanimous. Therefore, the Plan must provide each holder of a claim or interest that has not accepted the Plan with an amount equal to or greater than the amount he, she or it would receive under Chapter 7.

61. In determining the liquidation value of the Debtor, the court will look first to the breakup value of PSNH. If the Debtor were sold in parts, the evidence in the record suggests that the value of the pieces is less than the Debtor's going concern value. As stated in the expert testimony presented by NU's

financial advisors, while some pieces of the Debtor might have value independent of their inclusion in an integrated electric utility, many of the Debtor's assets do not. In addition, if multiple parties bought pieces of the Debtor it is not clear who, if anyone, would bear the responsibility to serve the PSNH customers. Because of this uncertainty, it is highly unlikely that the State would permit the Debtor to be sold in pieces. If PSNH were sold in pieces, it would bring less than what is being offered under this Plan.

62. An alternative liquidation analysis of PSNH would be the value of PSNH sold as a going concern. The liquidation value of the Debtor as a going concern is found to be no higher than the value that is proposed under this Plan. This bankruptcy has been in effect an auction of PSNH, which has been highly

publicized and generated national attention and several substantial and serious bidders. Three utility companies with competent counsel and financial advisors competed actively to submit a winning plan proposal.

63. The significant publicity surrounding this bankruptcy has assured that any interested potential bidder was informed about this case. Interested bidders had many opportunities to negotiate with the Committees, the Debtor, and the State under the special procedures adopted by the Court for this unique case.[3]

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[3] The unusual problem of "valuation circularity" presented by a chapter 11 reorganization of a regulated monopoly utility company, and the special procedures employed in this reorganization case to deal with that unique problem, have been discussed at some length in prior opinions of this Court. See, e.g., In re PSNH, 88 B.R. 521 (Bankr. D.N.H. 1988); In re PSNH, 88 B.R. 546 (Bankr. D.N.H. 1988); In re PSNH, 99 B.R. 155 (Bankr. D.N.H. 1989); In re PSNH, 99 B.R. 177 (Bankr. D.N.H. 1989); In re PSNH, 108 B.R. 854 (Bankr. D.N.H. 1989).

64. The Plan that ultimately succeeded in attracting the support of the Committees was the plan that offered the most value for the Debtor. A Commissioner of the Federal Energy Regulatory Commission has stated that this auction assured that maximum value was paid for the Debtor. Therefore, the Court finds that the liquidation value of the Debtor is no more than what has been offered for the Debtor in this Proposed Plan.

65. The Debtor would not command as high a price in a normal Chapter 7 liquidation because of the value added to the Debtor by the Rate Agreement entered into with the State. This Rate Agreement provides certainty for the purchaser of the Debtor about rates that can be charged and, therefore, revenues that will be generated, without the delay and cost of litigation. A sale of the Debtor without the Rate Agreement would not

command as high a price because the purchaser would discount the value of the Debtor to account for this uncertainty.

66. This Plan, therefore, provides more to the creditors than they would receive under a normal Chapter 7 liquidation for the following reasons:

a. The liquidation value of the Company in a Chapter 7 would not be as high as it is for this Chapter 11 Reorganization;

b. In a Chapter 7 bankruptcy, there would be a significantly greater number and amount of unsecured creditor claims resulting from the rejection of contracts. In particular, rejection of the contracts with the small power producers alone would generate additional claims of more than $600,000,000. In addition, there would be the time element and administrative expense of a Chapter 7 liquidation which would increase the

administrative expenses of the bankruptcy and force the claim and interest holders to wait until the bankruptcy was concluded before receiving any dividend from the estate. Furthermore, interest on secured debt would continue to accrue.

c. In a liquidation, the Court finds that insufficient funds would be generated to pay the full amount of unsecured claims. There would be no distribution with respect to interests in a liquidation.

67. The suggestion that the State could take over the Debtor by eminent domain or otherwise, so as to preserve more value for the estate, is mere conjecture and speculation. There is no evidence that the State has any interest in taking over the Debtor. Even if the State had expressed such an interest, there is no legal authority or financing capacity for the State to take over the

Debtor for a value greater than that proposed under this Plan. The New Hampshire General Court has recently passed a bill which would legislate the New Hampshire Energy Authority out of existence.

68. There is no reason whatsoever to conclude that the United States would ever take over the Debtor or Seabrook.

69. The final approach to liquidation and analysis of this decidedly unique Debtor --- wherein it or its successor or successors in no event will cease to supply electricity to customers in New Hampshire --- is to consider a non-normal liquidation scenario comparing the return to the estate under the Plan with the return the Debtor or its successors could expect to receive under a traditional ratemaking proceeding for its interest in the Seabrook plant. The Court itself during the disclosure statement hearings and proceedings insisted

this alternative be set out for the consideration of creditors and stockholders before they were called to vote upon the Plan. The objections to the confirmation filed by common stockholders Rochman, Kaufman and Richards ("RKR") generally raise this issue in the sense that they question the appropriateness of the Rate Agreement and compromise embodied in the Plan and argue that more value could be realized for shareholders if the Plan is denied confirmation and either the debtor-in-possession or its successors were authorized to pursue a litigated rate case before the NHPUC. This contention is considered and rejected in the confirming order entered separately this date. There is no requisite showing that the members of the impaired classes would receive more under a liquidated rate case than is provided for them under the Plan. Section 1129(a)(7) therefore is satisfied

under the alternative liquidation analysis approach as well.

70. The Court accordingly determines, in consideration of all the foregoing, that holders of claims or interests will receive under the Plan property with a present value not less than that they would receive under a Chapter 7 liquidation of the Debtor under either a breakup value analysis, an auction style analysis, or a rate case analysis.

H. 1129(a)(8)

71. Each class has accepted the Plan, as provided in Section 1126, except Class 13.

I. 1129(a)(9)

72. The Plan provides for the full payment in cash upon the effective date of the Plan of all claims of a kind specified in Sections 507(a)(1) through (a)(7).

J. 1129(a)(10)

73. At least one class of claims that is impaired under the Plan has accepted the Plan as determined without including the acceptance of the Plan by any insider of the Debtor.

K. 1129(a)(11)

74. The Proponents have shown by a preponderance of the evidence that there is a reasonable likelihood that Reorganized PSNH will in fact be able to perform its obligations under the Plan as projected. In determining whether the Plan passes the feasibility test, the court should consider the adequacy of the capital structure, the earning power of the business, economic conditions and the ability of management. In re Agawam Creative Marketing Ass'n, Inc., 63 B.R. 612, 619-620 (Bankr. Mass. 1986). The evidence in the record, particularly the testimony of the financial advisors, demonstrates that, upon confirmation, the

Debtor will be able to satisfy its obligations under the Plan.

L. 1129(a)(12)

75. The Plan does not explicitly provide for the payment of expenses under 28 U.S.C. § 1930. The Plan does provide, however, for the full payment of administrative costs and expenses approved by the bankruptcy court upon the Effective Date, Plan at Section IV, Part B(1)(a), which should include said expenses. In any event, the Court will return jurisdiction of all parties in interest necessary to assure that the § 1930 expenses are paid. Therefore, this requirement is satisfied.

M. 1129(a)(13)

76. Section 1129(a)(13) does not apply to this Plan as this bankruptcy was commenced prior to June 16, 1988. Notwithstanding, however, the Plan does not affect retiree benefits.

N. 1129(b)

77. All impaired classes have accepted the Plan, except Class 13 (the Warrant holders). The Plan must, therefore, satisfy Section 1129(b) with regard to the treatment of Class 13.

78. Section X of the Plan requests confirmation pursuant to Section 1129(b).

79. Section 1129(b) requires a finding that the Plan does not discriminate unfairly and is fair and equitable with respect to a dissenting class.

80. The Plan is fair and equitable to Class 13 pursuant to Section 1129(b)(2)(C), because Class 13 is the most junior class and, therefore, no class junior to Class 13 is receiving anything under the Plan, and no class under the Plan will receive more than the allowed amount of their claims.

81. The Plan does not unfairly discriminate against Class 13 because

there are no other classes with similar legal claims against the Debtor; therefore, the treatment of Class 13 is not inconsistent with the treatment afforded to such classes. See 5 Collier on Bankruptcy, Section 1129.03 at 1129-50 (I. Hall ed. 15th ed. 1989).

O. 1129(c)

82. There are other plans of reorganization that have been proposed in this case. No other plan has been moved for confirmation, however; therefore, this Plan is found to be the only plan pending before this court.

P. 1129(d)

83. There has been no request by a government unit that is a party in interest to this case to make a finding that the principal purpose of the Plan is the avoidance of taxes or the avoidance of the application of the securities laws.

III. General Conclusions

84. On the record and evidence in this case, and in conformance with the foregoing findings and conclusions, the Plan pending before this Court in this proceeding should be confirmed and a separate Order to that effect shall issue.

DATED at Manchester, New Hampshire this 20th day of April, 1990.

J.E. Yacos
JAMES E. YACOS
BANKRUPTCY JUDGE

DEBTOR TO SERVE FULL LIST.

APPENDIX G

THIRD AMENDED DISCLOSURE STATEMENT OF NORTHEAST UTILITIES SERVICE COMPANY PURSUANT TO SECTION 1125 OF THE BANKRUPTCY CODE

[EXTRACTS]

II. INTRODUCTION

* * *

D. COMMITTEES

* * *

2. Equity Committee
[p. 11]

As a result of the different priority of the Existing PSNH Preferred Stock, the Existing PSNH Common Stock and the Warrants, whose holders' interests are represented by the Equity Committee, the potential rights of the constituencies represented by the Equity Committee differ and may conflict. All of the current members of the Equity Committee are holders of Existing PSNH Preferred Stock except one, Martin Rochman, who holds

only Existing PSNH Common Stock and has voted against the Committee's position on the Plan. Certain members of the Committee are holders of both Existing PSNH Preferred Stock and Existing PSNH Common Stock. No members of the Equity Committee hold Warrants.

* * *

III. THE DEBTOR

* * *

J. EMPLOYEE SEVERANCE BENEFIT MODIFICATIONS

NU and PSNH have agreed to ask the Bankruptcy Court to approve a stipulation (the "Stipulation") that would modify certain of the employee benefit arrangements previously put in place by PSNH, subject to Bankruptcy Court approval, and which were subject to various objections before the Bankruptcy Court as originally proposed. References to PSNH in this discussion of the Stipulation include

references to Reorganized PSNH after the Effective Date. The Stipulation provides that the employment agreements previously entered into by PSNH with its five most senior managers would be amended to provide termination benefits of two times the employee's then effective annual salary (plus accumulated vacation) (the original employment arrangements with these persons provided for termination benefits for a period of three times such amounts); for a continuation of medical, dental and life insurance benefits for a period of two years following termination (the original agreements provided such benefits for three years); for two years' additional credit under the PSNH pension plan and excess benefit plan upon termination (the original agreements provided for three years' credit); and for the deletion of a provision that would have obligated PSNH to make certain tax in-

demnity payments to such employees.

In addition, the Stipulation provides that the Special Severance Pay Plan put into place on September 13, 1989 (subject to approval of the Bankruptcy Court) for the benefit of 51 key employees of PSNH would be amended to provide: that a required relocation outside of PSNH's service territory within 18-months following a change in control of PSNH (such as the Effective Date) would be "good reason" for the resignation of a covered employee, entitling the employee to the benefit of the Special Severance Pay Plan upon such a resignation (the original Special Severance Plan provided that relocation beyond a twenty-mile radius of the employee's prior job site gave rise to "good reason" to resign); that severance benefits under the Special Severance Pay Plan would be equal to 1 1/2 weeks' salary for each 6 months of

service, with a minimum of one year's salary for all vice presidents, corporate secretary and corporate controller (the prior minimum was one and one-half year's salary), and a minimum of one year and a maximum of one and one-half years' salary for all other covered employees (the prior maximum was two years' salary); and added an early retirement benefit for covered employees with 20 years of service with PSNH who had reached their 55th birthday prior to the 90th day after Confirmation, and who elect to retire on or prior to such date.

The Stipulation also provides that the amendments to the PSNH Pension Plan adopted in September, 1989, would be canceled (those amendments had provided for an early retirement program for all employees in the event of a change in control).

* * *

V. DESCRIPTION OF THE PLAN

* * *

C. CLASSIFICATION AND TREATMENT OF CLAIMS AND INTERESTS

[pp. 25]

* * *

12. Class 11 (Preferred Stock)

[pp. 32]

* * *

The following table sets forth the Equity Committee's estimate of the range of values of the distribution under the Plan to holders of Allowed Claims and Interests in Class 11 in several different scenarios. In each scenario, the "best case" is one in which the Petition Date Amount of Allowed Claims in Classes 10 and 10A total $857,400,000 and the book value adjustment is a positive $10,000,000, and the "worst case" is one in which the Petition Date Amount of

Allowed Claims in Classes 10 and 10A total $900,000,000 and the book value adjustment is a negative $10,000,000

	Total Estimated Value(a)	Percent of Total Par Value(b)	Percent Total Claims(c)
Seabrook Operating and Merger Occurs(d)			
best case	$337.0	104.9%	69.7%
worst case	$325.2	101.2%	67.3%
Seabrook Operating and No Merger Occurs(d)			
best case	$326.1	101.5%	67.5%
worst case	$314.3	97.8%	65.0%
Seabrook Canceled and Merger Occurs(e)			
best case	$209.5	62.5%	43.3%
worst case	$155.2	48.3%	32.1%
Seabrook Canceled and No Merger Occurs(e)			
best case	$194.9	60.6%	40.3%
worst case	$140.6	43.7%	29.1%

(a) Assumes value of Reorganized PSNH Common Stock if $20.00 per share, value of Contingent Notes is 122% of face (principal) amount, and value of each NU Warrant is $200.

(b) Total par value of outstanding Preferred Stock is $321.4 million.

(c) Total Preferred Stock claims are $483.3 million, including par value of $321.4 million and pre-Petition Date accrued and unpaid dividends of $161.9 million.

(d) Assumes issuance of maximum potential principal amount of Series C Contingent Notes.

(e) Assumes Seabrook Unit No. 1 is canceled prior to the Effective Date.

* * *

13. Class 12 (Common Stock)

* * *

Seabrook Operating and Merger Occurs(c)	Total Estimated Value(a)	Estimated Value Per Share(b)
best case	$163.5	$3.88
worst case	$112.7	$2.67
Seabrook Operating and No Merger Occurs(c)		
best case	$157.6	$3.74
worst case	$106.8	$2.53
Seabrook Canceled and Merger Occurs(d)		
best case	$ 41.0	$0.97
worst case	$ 32.7	$0.78
Seabrook Canceled and No Merger Occurs(d)		
best case	$ 38.8	$0.92
worst case	$ 30.5	$0.72

(a) Assumes value of Reorganized PSNH Common Stock is $20.00 per share, value of Contingent Notes is 122% of face (principal) amount, and value of each NU Warrant is $2.00

(b) Based on 42,154,548 shares of Existing PSNH Common Stock outstanding.

(c) Assumes issuance of maximum potential principal amount of Series C Contingent Notes.

(d) Assumes Seabrook Unit No. 1 is canceled prior to the Effective Date.

* * *

VI ACCEPTANCE AND CONFIRMATION

[pp. 68 TO 70]

* * *

E. CONFIRMATION WITHOUT ACCEPTANCE BY ALL IMPAIRED CLASSES

[pp. 69 to 70]

* * *

If a class of equity security interests rejects the Plan, the Plan may still be confirmed so long as the Plan provides either that :(i) each holder of an interest included in the rejecting class receive or retain on account of that claim property which has a value, as of

the Effective Date, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, and the value of such interest; or (ii) the holder of any interest that is junior to the interests of such class will not receive or retain any property at all under the Plan on account of such junior interests.

NUSCO has requested in the Plan that if necessary the Plan be confirmed pursuant to Section 1129(b) of the Bankruptcy Code.

* * *

VII BEST INTERESTS

[pp. 70 to 74]

* * *

A. GENERAL RULES APPLICABLE TO A SEABROOK RATE CASE

As a regulated utility, PSNH has certain rights and responsibilities. It

is obligated to provide safe and reliable service on a non-discriminatory basis to all who request service. It must also conform to regulations with respect to the provision of its services to the public and limit its charges to the rates approved by regulatory agencies, most importantly the NHPUC. On the other hand, PSNH and its investors are entitled under state and federal law to just and reasonable treatment, including a fair opportunity to earn a reasonable return on capital invested to serve the public. Regulatory agencies are not required to follow any specific regulatory approach, but the end result of regulation must be fair to investors as well as consumers. And, while regulatory agencies are afforded a great deal of discretion, policies or practices that are clearly unreasonable and result in significant financial harm to a utility or its investors have been

held to violate the due process protections of the United States Constitution.

Traditional ratemaking and current New Hampshire law would permit the NHPUC to determine whether to allow inclusion in rates of all or part of PSNH's investment in Seabrook, once Seabrook begins "actually provid[ing] service to consumers." N.H. Rev. Stat. Ann. 378:30-a(the anti-CWIP law). PSNH contends that this investment will be approximately $2.9 billion at January 1, 1990, including $1.6 billion in carrying costs.

The fixed rate increases provided in the Rate Plan are lower than the rates which PSNH contends it would be entitled to collect under traditional ratemaking principles, once Seabrook is providing service to consumers and rate changes are authorized by the NHPUC. In effect, implementation of the Plan will result in recovery of $1.4 billion, or approximate-

ly 50%, of the Seabrook investment.

B. MAJOR ISSUES PRESENTED BY SEABROOK IN RATE CASE

The extent to which the investment in Seabrook would be reflected in PSNH's rates following a Seabrook rate case would depend on the NHPUC's findings on three issues; the prudence of the Seabrook investment, the extent to which the investment in the facility is "used and useful", and avoidance of "rate shock".

1. Prudence.

Under New Hampshire law, only that portion of an investment that is "prudently incurred" may be reflected in rates. An investment is "imprudent", and excluded from rates, to the extent that (i) it was "forseeably wasteful" based on information available to the utility at the time the investment was made or (ii) the cost is excessive due to imprudent construction management. The factual

analysis associated with prudence determination is lengthy and complex, and the facts are subject to a variety of conclusions.

2. Used and Useful.

Investment in a facility may be recovered in rates only to the extent that the facility is "used and useful" to the utility franchise--in other words, that the facility is necessary and economic in meeting PSNH's requirements to provide adequate electric service to New Hampshire customers. The NHPUC has been accorded wide flexibility to apply this principle as a means of sharing the excess capacity burden between investors and customers. In a Seabrook rate case, the NHPUC would be asked to determine what could reasonably be done with the Seabrook investment as of the time of the "used and useful" determination. Among other considerations, at issue could be

whether and how long any portion of Seabrook power or capacity would be excess to the needs of PSNH's retail customers.

3. Affordability of Rates.

The NHPUC is given wide latitude to establish "just and reasonable" rates. As the New Hampshire Supreme Court has said, "[t]he traditional ratemaking process gives the commission flexibility to accommodate the legitimate interests of both customers and investors in responding to the extraordinary issues disclosed by [PSNH's Seabrook investment]." Appeal of Conservation Law Foundation, 127 N.H. 606, 648 (1986). "There is substantial economic leverage to establish a rate level that will not be oppressive to consumers or the New Hampshire economy or which is unfair to stockholders. Id. at 644, quoting the NHPUC, Re Pub. Serv. Co. of N.H., 66 PUR 4th 349, 423 (1985).

If a rate increase or series of increases is too high or comes too quickly, it might adversely affect the New Hampshire economy or adversely affect PSNH's markets for electricity by depressing demand or driving customers from the system, a phenomenon commonly referred to as "rate shock". It is likely that the NHPUC would not permit inclusion in rates of PSNH's entire Seabrook investment at one time, since to do so might require rate increases which would be too high or come too quickly. Accordingly, PSNH would likely propose a rate moderation plan incorporating either or both of two ameliorative concepts: (i) one which would recognize a recovery of less than PSNH's full $2.9 billion investment or (ii) a gradual increase in rates over a number of years, based on the rate increase "phase-in" concept included in the Rate Plan.

C. CONDUCT OF A RATE CASE

In a Seabrook rate case, as in any rate case, the burden of proof would be upon PSNH on all issues, including the extent to which its Seabrook investment was prudent and the extent to which the Seabrook facility is "used and useful". The NHPUC would have up to 18 months to decide the case and establish ne permanent rates. It is possible that the NHPUC could implement a temporary rate increase during the pendency of the case. It is also possible that the NHPUC, in the exercise of its own discretion or at the Bankruptcy Court's request, could adopt expedited procedures that would very substantially reduce the time needed for its review. Substantial opposition to both temporary and permanent rate increases can be expected from other instrumentalities of the State and intervenor groups seeking to minimize the amount

of Seabrook investment to be recognized for ratemaking purposes. It cannot be predicted how long a Seabrook rate case proceeding would actually test, whether or at what level temporary rate increases would be allowed during the pendency of the proceeding, or the extent to which the Seabrook investment would actually be recognized for ratemaking purposes as the result of such a proceeding.

D. POSSIBLE OUTCOME OF A SEABROOK RATE CASE

1. Possibility of Full Recovery

Under traditional utility ratemaking as practiced by the NHPUC and the FERC, if Seabrook were to commence commercial operation PSNH could request that its full investment in Seabrook Unit No. 1 be reflected in rates as of thee in-service date of the unit. Assuming that Seabrook began providing service to consumers January 1, 1990, the investment in Sea-

brook would be approximately $2.9 billion, including nuclear fuel. Inclusion of $2.9 billion in rate base on an average basis, assuming a recognized cost of capital which is lower than the currently allowed cost of capital, represents an overall rate base value of approximately $3.4 billion. PSNH performed an analysis based on a December 31, 1988 test year that indicated that a rate increase equivalent to a one-time increase of approximately 89% would be necessary to support such a $2.9 billion addition.

PSNH has stated that it would seek recovery of $1.8 billion of its Seabrook investment in a Seabrook rate case, assuming that Seabrook becomes operational in the early part of 1990.

2. Prudence of Seabrook Investment.

In a Seabrook rate case, PSNH would contend that its Seabrook investment was prudently incurred. In support of this

position, it could point to several audits of the Seabrook project which, in general, found the project to have ben managed prudently. For example, an audit conducted by an independent consultant selected by the NHPUC found that 93% of the Seabrook investment, at the time construction was completed in October of 1986, had been prudently incurred. The audit findings, however, have not been adopted by the NHPUC, and very likely would be contested by various parties in a Seabrook rate case. It should also be noted that a prudence audit conducted for the CDPUC found that 25% of the Seabrook investment was imprudently incurred and should be disallowed.

3. Used and Useful Nature of Seabrook.

Under New Hampshire's anti-CWIP statute, PSNH's Seabrook investment may not be reflected in rates until the plant

is actually providing service to consumers, which PSNH believes will occur when Seabrook starts supplying net electrical output to the NEPOOL grid. This could be achieved as early as two weeks after Seabrook receives its full power authorization. However, the statutory phase "actually providing service to consumers" has not previously been applied and may be subject to an interpretation that would require additional conditions to be met.

PSNH believes Seabrook's operation will enhance the reliability of PSNH's service to its customers by adding capacity necessary to meet the growing demand for electricity in its service territory, as well as enhancing NEPOOL reliability by adding needed capacity to the New England region. Currently, PSNH is purchasing approximately 350 MW to service that demand and meet its NEPOOL obliga-

tions through short-term purchases from sources which may not continue to be available. Even with Seabrook on line, forecasted amounts of surplus capacity are relatively small and would last only through 1993, assuming a 2.3% growth rate. Factors such as higher growth rates or a delay in Phase II of the Hydro Quebec interconnection could cause PSNH to be without this surplus at an even earlier period. The "used and useful" issue, however, would be a matter of contention in a rate proceeding, and PSNH's conclusion would be subject to challenge as to both the need for and cost of Seabrook capacity.

4. Affordable Rate Levels.

A study completed in early 1989 for PSNH by outside economic consultants Bower Rohr & Associates indicates that a one-time nominal rate increase that averages 31% and varies among customer class-

es with annual increases thereafter at the rate of inflation is affordable, that is, both bearable and feasible. The consultants also reviewed a rate plan consisting of five annual step increases with an aggregate rate level effect somewhat less than the 31% one-time increase, and increases under conventional rate making thereafter, and found that this lower level of aggregate increase was also bearable and feasible. The Bower Rohr & Associates study was in part based upon a review and assessment of related studies done by PSNH personnel and other consultants, which reached similar conclusions. The level of rate increases considered by these studies is significantly higher than the increases included in the Rate Agreement.

The studies included examinations of the price elasticity of demand for electric energy, the price and availability

of alternative sources of energy, the possibility of industrial customers relocation or use of cogeneration facilities, and the extent to which higher electric rates might result in the establishment of municipal electric departments to serve their residents directly, Also considered were the effects that higher electric rates might have on the economic and social well-being of customers.

The conclusions reached in PSNH's studies were that while there would be some social and economic effects and some loss of sales to PSNH from the increases under review, the higher rates would not cause undue social disruption or economic hardship, or shrinkage in size of PSNH as an energy provider. The issue of elasticity of demand, however, is complex, and studies conducted by others would likely be offered to show that the customer response to such increases would be more

severe.

5. Recent Seabrook Settlements

There have been two recent rate case settlements in other jurisdictions in which the recovery of the Seabrook investment of other utilities was determined. In one case, the New England Electric System was granted recovery of $326 million of its $543 million investment in Seabrook (60%) if the plant operates and $282 million (52%) if the plant does not operate. In the second case, United Illuminating was allowed recovery of $640 million of its $1.182 billion investment in Seabrook (52%). Each of the utilities had also been permitted to recover a portion of its Seabrook related costs during construction. If the prior cost recovery is considered, the percentage of total investment recovered would be higher. The settlements also involved the resolution of non-Seabrook issues which

resulted in additional benefits to the utilities.

It is not possible, however, to know for certain whether the results of a Seabrook rate case would be more or less favorable than the recent settlements.

6. Comparative Advantages of Proposed Rate Plans and a Seabrook Rate Case.

PSNH has indicated that in a Seabrook rate case it would seek recovery of $1.8 billion of its investment in Seabrook, approximately $400 million more than would be realized for the benefit of creditors and shareholders under the Rate Agreement. There can be no assurance, however, that PSNH would be successful in recovering $1.8 billion of its Seabrook investment in a rate case, nor can it be known for certain what level of recovery the NHPUC actually would approve. It is reasonable to assume that a Seabrook rate case would be vigorously

contested and that various parties would urge recovery of a lesser amount.

There are numerous risks presented by a rate case that would be avoided under the Rate Agreement. For example, implementation of the Rate Agreement would mean that PSNH would achiever rate increases, and corresponding values, regardless of whether or when Seabrook runs, and regardless of any of the risks attendant to a litigated rate case.

Implementation of the Rate Agreement also means that PSNH is assured of certain rate increases throughout the term of the Rate Agreement, rather than being exposed to the risk that subsequent proceedings might minimize whatever gains were achieved in a Seabrook rate case. In addition, the Rate Agreement allows the Reorganization Case to be resolved sooner, thus allowing distribution of recoveries sooner than would be likely if a

fully contested Seabrook rate case were pursued instead.

For the foregoing reasons, NUSCO believes that the Plan is in the best interests of creditors and stockholders when compared with this alternative.

* * *

EXHIBIT C
[to the Disclosure Statement]

FORM 10-K
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
For the fiscal year ended
December 31,1988

[EXTRACTS]

* * *

Item 8: FINANCIAL STATEMENTS AND SUPPLEMENTARY DATA

* * *

Notes to Financial Statements

* * *

3. Change is Seabrook Accounting and Losses on Generating Projects

The Company's financial difficulties are directly related to the magnitude of its investment in Seabrook and to the Company's inability to base its rates upon the cost of this project prior to its operation (currently assumed to be January 1, 1990 for financial planning purposes). The Company determined that, should the Seabrook Plant be permitted to become operational, political and compet-

itive pressures would not permit the Company to recover the recorded cost of its investment in accordance with traditional utility ratemaking practices. Accordingly, in 1987 the Company changes its method of accounting for its investment in Seabrook to eliminate AFUDC from capitalized costs and to recognized capitalized interest and associated income tax effects. This change in method of accounting effectively restated the cost basis of Seabrook to eliminate the previously assumed effects of regulation. the 1987 financial statements reflect this change as if it had occurred at January 1, 1987.

In 1988 the Financial Accounting Standards Board issued definitive guidance to be followed in situations where the recorded cost of investments would not be recovered through traditional ratemaking practices. While the new

accounting standard would provide for treatment of the event as an extraordinary item, rather than as a change in accounting principle, the overall result of the application of the new standard would not produce a result materially different than the accounting followed by the Company in 1987, and accordingly, no restatement of that accounting has been made. The new standard would not require the elimination of the previously assumed effects of regulation and restatement of assets, unless, as was the case for the cost basis of Seabrook, there was impairment.

Management has determined that further cost capitalization in connection with Seabrook would not be prudent and therefore ceased capitalizing such costs effective December 31, 1987. Accordingly, a loss of $212.0 million was recognized in 1987 associated with estimated remain-

ing costs to be incurred prior to an assumed operating date of January 1, 1990. The loss provision of $212.0 million included interest of $70 million relating principally to interest on secured debt. It did not include a provision for interest on unsecured debt after January 28, 1988. During 1988 $109.5 million was charged to the accrual, including the $47.5 million of capitalized interest associated with the Seabrook investment. The Company has not changed Seabrook's assumed operational date for financial forecast purposes of January 1, 1990. If there are delays in that date, Seabrook costs, approximately $8 million of each month of delay will have to be accrued by the Company when the delay becomes probable.

* * *

Item 12. SECURITY OWNERSHIP OF CERTAIN BENEFICIAL OWNERS AND MANAGEMENT

Reference should be made to the information furnished in the tabular listing of Directors of the Company under "Item 10. Directors and Executive Officers of the Registrant" for information as to the shares of stock owned by Directors of the Company.

To the knowledge of the Directors, no person owns beneficially as much as 5% of the outstanding shares of Preferred Stock, $25 par value. The following table sets forth information with respect to shares of Common Stock and Preferred Stock, $100 par value, owned beneficially as of March 16, 1989 by all persons who are known by the Directors to own beneficially more than 5% of the outstanding shares of either Common Stock or Preferred Stock, $100 par value.

Preferred Stock, $100 par value.

The Prudential Insurance Company	90,000	Record and Beneficial	14.64%

of America [address omitted]		
The Mutual Benefit Life Insurance Company [address omitted]	56,400 Record and Beneficial	9.18%

Common Stock, $5 par value

The Manufactures Life Insurance Company [address omitted]	3,467,025 Beneficial	8.53%(1)
Donald Smith & Co., Inc. [address omitted]	2,730,275(2)	7.34%

(1) According to a Schedule 13G dated February 6, 1985 filed by the Manufacturers Life Insurance Company, it beneficially owns currently exercisable warrants to purchase 3,467,025 shares of common stock, or 8.5% of the outstanding shares of Common Stock, assuming exercise by Manufacturers of the warrants and that no other warrants are exercised.

(2) According to a Schedule 13G dated February 6, 1989 filed by Donald Smith &

Co. Inc. an investment management firm, the firm owns 2,730,275 shares of Common Stock on behalf of certain beneficial owners:

The following table sets forth information as of March 16, 1989, with respect to the number of shares of Preferred Stock and Common Stock and number of warrants owned beneficially by all Directors and officers of the Company as a group:

Class	Number of Shares or Warrants	Percent of Outstanding Class
Common Stock	18,222	0.05%
Warrants to Purchase Common	8,000	0.04
Preferred Stock $100 par value	112	0.01
Preferred Stock $25 par value	2,320	0.02

(2)

No. 92-14

Supreme Court, U.S.
FILED
JUL 29 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

IN RE: PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE, DEBTOR

MARTIN ROCHMAN, EDWARD KAUFMAN
and ROBERT C. RICHARDS

Petitioners,

v.

NORTHEAST UTILITIES SERVICE COMPANY
and OFFICIAL COMMITTEE OF EQUITY
SECURITY HOLDERS

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENT STATE OF NEW HAMPSHIRE IN OPPOSITION TO THE PETITION

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IN THE

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BRIEF OF RESPONDENT STATE OF NEW HAMPSHIRE IN OPPOSITION TO THE PETITION

Respondent State of New Hampshire, through its Attorney General, hereby submits its Brief in Opposition to the Petition for Writ of Certiorari. The State was a party in interest in the Bankruptcy Court and a party in the district court and court of appeals.

INTRODUCTION

Petitioners[1], three individuals holding less than 0.5% of the stock of Public Service of New Hampshire ("PSNH"), seek to unravel the consensual bankruptcy reorganization plan that restored the largest utility in New Hampshire to financial health and provided rate certainty to ratepayers in New Hampshire. RKR was the only party to challenge the consensual plan below, and its claims were rejected by the bankruptcy and district courts; then, after the PSNH reorganization had been completed, the court of appeals denied their appeal as moot. Petitioners now seek review here on the argument that the court of appeals had no discretion to dismiss their appeal as moot, even though the entire PSNH reorganization had been completed, all parties had relied on the reorganization in consummating the thousands of transactions necessary to bring PSNH out of bankruptcy, and the relief requested — undoing the reorganization — would have caused serious and immediate economic harm to parties and nonparties and left the bankruptcy court the "nightmarish" job of cleaning up the resulting mess. Pet. App. 24a. Petitioners do not cite a single decision of this Court which would have required the court of appeals to entertain such a moot appeal or have compelled it to order such drastic relief. There is no support for the petition, and it should be denied.

COUNTERSTATEMENT OF THE CASE

The history of this case is long and complex, and the facts pertinent here are documented accurately by the opinions of the court of appeals and district court (in contrast to the argumentative factual recitation provided by petitioners). *See* Pet. App. at 2a-9a, 35a-54a.

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[1] Petitioners Rochman, Kaufman and Richards refer to themselves, collectively, as "RKR." The State will use this designation.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' APPEAL WAS PROPERLY DETERMINED TO BE MOOT

Article III of the Constitution does not permit federal courts to adjudicate cases or controversies for which no remedy is available — *i.e.*, "moot" cases. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). A case or controversy is deemed moot if the injury alleged is not "*likely to be redressed* by a favorable judicial decision," *id.* at 477, or is not "admitting of *specific relief* through a decree of a conclusive character." *Id.* (internal quotations omitted; emphasis added). *Cf. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) ("a realistic appreciation of the consequences of judicial action" is required). Thus, "it is not enough" that a claim was remediable "when suit was filed," *Lewis*, 494 U.S. at 477; a remedy must be available throughout the action and any appeals. *Id.*

Petitioners' action became moot on May 16, 1991 when, as the court of appeals indicated, "PSNH became committed to implement the numerous complex arrangements required to enable its restructuring and to finance the distributions contemplated under the confirmed plan." Pet App. 21a. Petitioners had the opportunity to seek a stay of these transactions in the court of appeals,[2] but did not do so. *Id.* 16a-18a. Having not sought a stay, "the innumerable transfers legitimately effected to and among innocent third parties in the absence of a stay, and in reliance on the order of confirmation and the rate agreement [with the State] . . . plainly represent[ed] so substantial a consummation of the reorganization plan as to render the requested appellate relief impracticable." *Id.* 23a.

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[2] *Connecticut National Bank v. Germain*, 112 S. Ct. 1146, 1148 (1992).

Petitioners argue, however, that the First Circuit was required to ignore these considerations, decide the case on the merits, and then woodenly grant the equitable relief requested. Pet. at 49, 54. But even if, contrary to *Lewis*, the court of appeals had reached the merits and ruled for petitioners, it would have been a futile act, for equitable relief clearly would not have been appropriate. "[A]n injunction is an equitable remedy that does not issue as of course." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987). "[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). Rather, a court must account for "the important role of the 'public interest' in the exercise of [its] equitable discretion." *Amoco*, 480 U.S. at 545.

Here, the relief requested by RKR plainly was *in*consistent with the public good: RKR's action furthered only its parochial financial interests. All other parties — including the debtor, the State, and each creditor group — agreed to the consensual plan even though it required every party to make concessions. Pet. App. 42a. After extensive hearings, the plan was deemed "a fair and equitable compromise" by the bankruptcy court (*id.* 65a), and the district court affirmed. *Id.* 59a. Further, the Federal Energy Regulatory Commission found the reorganization of PSNH, and its merger with Northeast Utilities Co., to be in the public interest. *Northeast Utilities Service Co.*, 53 FERC ¶ 63,020, at 65,211-12 (1990), *summarily aff'd*, 56 FERC ¶ 61,269, at 61,993 (1991). The public interest supported *preserving* the reorganization plan, not dismembering it.

II. RKR's "PRUDENT INVESTMENT" ARGUMENT IS BARRED BY RES JUDICATA

Petitioners' alternate basis for review rests on the premise that "[t]his case is ultimately about whether PSNH has a right to recover its prudent investment in Seabrook." Pet. at 57. This is entirely inaccurate. RKR's argument that PSNH should be entitled to recover all prudent Seabrook costs was addressed by the New Hampshire Public Utilities Commission when it approved the Rate Agreement. Pet. App. 5a. The PUC rejected RKR's claim for lack of standing, its decision was affirmed by the New Hampshire Supreme Court, and RKR sought review in this Court on the same issue it seeks to raise anew in this petition,[1] but review was denied. *Appeal of Richards*, 134 N.H. 148, 590 A.2d 586, *cert. denied*, 112 S. Ct. 275 (1991).

The bankruptcy and district courts correctly focused their inquiries instead on whether, as RKR had contended, PSNH could recover in a litigated rate case more than the $1.5 billion value provided in the reorganization plan. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) (bankruptcy court must assess "the probabilities of ultimate success should the claim be litigated"). Both the bankruptcy and district courts found PSNH would not likely succeed in such a suit for multiple reasons. First, a public utility commission is not required to employ the "prudent investment" standard in ratemaking determinations (as RKR had argued). *See Duquesne Light Co v. Barasch*, 488 U.S. 299, 315-16 (1989). Second, *the most* PSNH would have requested in a rate case was $1.8 billion (which was the investment reflected on its Seabrook accounts)

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[1] Petitioners' question presented asked "whether [the Rate Agreement] will enable PSNH to recover its prudent investment" in Seabrook. Pet. at i, *Richards v. New Hampshire*, No. 91-200.

(pet. app. 91a n.2), and this amount was only $300 million more than the consensual plan would provide. This $300 million gain would not have offset the $528 million in additional debt costs resulting from a three-year delay to litigate the rate case. Pet. App. 188a, 154a. Finally, RKR's proposal to impose virtually all Seabrook's "crushing costs" (Pet. at 8)[1] on New Hampshire ratepayers was inherently counterproductive (Pet. App. 187a-188a), for a full Seabrook recovery, even if obtained, would have caused PSNH's rates to be approximately *double* the rates of other utilities in New England. *Id.* 99a-100a. This would have forced New Hampshire businesses to relocate or close (*id.* 104a), in turn leaving a smaller customer base to absorb the costs, and ultimately causing a "death spiral" to occur. *Id.* 100a-101a. These findings were well supported by the record, and could not have been considered clear error, even had the court of appeals reached the merits.

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[1] "Seabrook is the most expensive nuclear plant ever built, for its capacity." Pet. App. 120a.

CONCLUSION

The opinion of the court of appeals is entirely consistent with this Court's opinions, presents no conflict with any other court, and presents no issue of broad or recurring significance. By petitioners' own admission, "[s]uch a claim presumably could only happen in a utility bankruptcy and may in fact never happen again." Pet. at 54 n.9. The petition should be denied.

Respectfully submitted,

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No. 92-14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

IN RE: PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,

Debtor

MARTIN ROCHMAN, EDWARD KAUFMAN AND ROBERT C. RICHARDS,

Petitioners

v.

NORTHEAST UTILITIES SERVICE COMPANY, ET AL.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS NORTHEAST UTILITIES SERVICE COMPANY, PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether The United States Court Of Appeals For The First Circuit Correctly Applied Established Mootness Doctrine To The Circumstances Of This Case.

LIST OF PARTIES

Appellees state that Northeast Utilities Service Company is a wholly owned subsidiary of Northeast Utilities, a public utility holding company. Northeast Utilities Service Company has no subsidiaries. The following subsidiaries of Northeast Utilities have issued shares or debt securities to the public:

The Connecticut Light and Power Company
Holyoke Water Power Company
Western Massachusetts Electric Company
North Atlantic Energy Corporation
Public Service Company of New Hampshire

Other utilities with publicly-held securities in which Northeast Utilities and/or Public Service Company of New Hampshire have an interest that Rule 29.1 of the Rules of the Supreme Court of the United States may require to be disclosed are:

Connecticut Yankee Atomic Power Company
Maine Yankee Atomic Power Company
Vermont Yankee Nuclear Power Corporation

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v.

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BRIEF OF RESPONDENTS NORTHEAST UTILITIES SERVICE COMPANY, PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Introduction and Summary

Petitioners are three shareholders who objected to the plan of reorganization that enabled New Hampshire's largest electric utility, Public Service Company of New Hampshire ("PSNH"), to emerge from bankruptcy. They ask this Court to

allow them to force other investors to join their speculative and idiosyncratic crusade by undoing the complex financial, regulatory, and legislative actions that made PSNH's Chapter 11 reorganization possible. Were petitioners to succeed, they promise to lead their newly conscripted army of third party investors into protracted rate litigation, the results of which petitioners acknowledge they cannot guarantee, in the hope that PSNH will ultimately realize more value than provided for under the confirmed and fully implemented Chapter 11 plan.

Petitioners ignore the fact that the sources of the more than $2,300,000,000 required to bring PSNH out of bankruptcy did not invest in the risk of that litigation.[1] The United States Court of Appeals for the First Circuit did not, however, ignore that reality. Rather, because the reorganization could not be set aside without harming the thousands who had acted in justifiable reliance on the unstayed order of the bankruptcy court and because petitioners had failed to exhaust all opportunities to prevent the plan from being implemented, the First Circuit dismissed petitioners' appeal as moot.

Petitioners want this Court to reverse the First Circuit and to hold that the bankruptcy court was wrong to confirm the reorganization plan. To secure this ruling, petitioners suggest that the Court accept review of a case that is unique in its factual context but ordinary in its insistence that litigants follow established rules. Petitioners ask the Court to replace that customary principle with a new standard that would excuse

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[1] Indeed, petitioners' fellow shareholders in PSNH, for whose interests petitioners claim to speak, also did not want to risk that litigation. The common shareholders of PSNH, like all other impaired classes except the holders of the most junior warrants, accepted the reorganization plan by the requisite majority under § 1126(d) of the Bankruptcy Code, 11 U.S.C. § 1126(d) (1988).

litigants' noncompliance if "[they] had no reason to believe" that they could prevail by following the required course. (Petition for Writ of Certiorari ("Pet.") at 52.) In addition, petitioners request that this Court divest the federal courts of appeals of the authority to consider equitable principles when determining whether effective equitable relief remains possible. When evaluating the equity of granting relief, petitioners urge this Court to instruct the lower courts that the mere assertion of an allegedly constitutionally-based claim outweighs the interests of thousands of individuals and entities who have acted in reliance on an unstayed bankruptcy court order. Finally, petitioners ask this Court to enshrine their utility ratemaking theories in constitutional law, without any record to support their claims and without even the benefit of a decision on the merits from the court below.

Petitioners offer no reason for the Court to go to such extraordinary lengths. Petitioners' claim is, in their own words, "unique." (Pet. at 54.) The rules of law on which the First Circuit relied are clearly established and followed in all the lower federal courts; petitioners make no claim of any conflict among the circuits. The rules of law petitioners advocate have not been adopted by any court; petitioners do not suggest otherwise. In short, petitioners have identified no reason for this Court to review this case.

B. Relevant Facts and Proceedings

PSNH filed for bankruptcy on January 28, 1988. That filing created economic and planning uncertainty, the termination of which became a primary policy goal of the State of New Hampshire. *See* N.H. Rev. Stat. Ann. § 362-C (Equity Publishing Corp. 1984 & Supp. 1990).[2] Almost two years later,

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[2] N.H. Rev. Stat. Ann. 362-C:1 is entitled "Declaration of Purpose and Findings" and states a legislative finding, *inter alia*, that "[t]he bankruptcy of

(*Continued*)

Northeast Utilities Service Company, on behalf of its parent, Northeast Utilities, PSNH, the Official Committee of Unsecured Creditors, the Official Committee of Equity Security Holders, Citicorp, Consolidated Utilities and Communications, Inc. and Shearson Lehman Hutton Inc., filed a plan of reorganization. That plan embodied a two-step reorganization process. In the first step, distributions of cash and securities would be made to claimants in the bankruptcy and PSNH would emerge from bankruptcy as an independent company subject to a merger agreement with Northeast Utilities. In the second step, which could take place only after various federal and state regulatory approvals were obtained, PSNH would be merged into a Northeast Utilities subsidiary.

The keystone of the reorganization plan was a Rate Agreement with the State of New Hampshire[3] that assured PSNH of rate increases during each of the next 7 years, resolved the issues surrounding the ratemaking treatment of PSNH's investment in the Seabrook nuclear plant and provided PSNH with other guarantees that limited its future financial risk.[4] (Petition Appendix ("Pet. App.") at 95a-96a.) The Rate

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(*Continued*)

the state's largest electric utility, Public Service Company of New Hampshire, has threatened the adequacy, reliability and cost of electric service."

3 The Rate Agreement was negotiated by the Governor and Attorney General of New Hampshire and then approved by the legislature. *See* N.H. Rev. Stat. Ann. § 362-C.

4 Included in the Rate Agreement is a fuel and purchased power adjustment clause ("FPPAC"), which adjusts customer charges to reflect changes in fuel and purchased power costs and also relieves PSNH of the risk of several major contingencies, including the premature retirement of Seabrook. The FPPAC was and continues to be crucial in assuring the financial stability of reorganized PSNH.

Agreement allowed the Northeast Utilities plan to provide $2.3 billion in distributions to the creditors and owners of PSNH. (Pet. App. at 61a.) No other plan proposed during the six-month period in which any interested party was allowed to propose a plan of reorganization[5] offered as much value.

After six days of hearings, on April 20, 1990, the bankruptcy court confirmed the reorganization plan proposed by Northeast Utilities and others. Petitioners participated actively in the confirmation hearings as opponents of the plan. Indeed, as the bankruptcy court noted in its extensive memorandum opinion overruling petitioners' objections, (Pet. App. at 61a-169a), most of the time spent in the confirmation hearings focused on petitioners' claims. (Pet. App. at 64a.)

While their appeal from the confirmation order was pending in the district court, petitioners moved to stay the confirmation order pending appeal. The bankruptcy court denied that motion after a hearing. (Pet. App. at 6a-8a) (citing *In re Public Serv. Co.*, 116 B.R. 347 (Bankr. D. N.H. 1990)). Petitioners never appealed the order denying the stay. (Pet. App. at 8a.)[6]

The United States District Court for the District of New Hampshire affirmed the decision of the bankruptcy court on August 22, 1991. (Pet. App. at 34a.) The First Circuit dismissed

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5 The bankruptcy court ended PSNH's exclusive right to propose a plan of reorganization by Amended Memorandum Opinion dated March 22, 1989. *In re Public Serv. Co.*, 99 B.R. 155 (Bankr. D. N.H. 1989).

6 Petitioners did attempt to file a new motion to stay execution of the confirmation order pending appeal with the district court, but were not allowed to file that motion because it did not conform to a local rule of the court. Petitioners neither corrected their error and refiled their motion nor appealed the action of the district court. (Pet. App. at 8a.)

petitioners' appeal of that decision as moot on May 6, 1992. The court of appeals found petitioners' claim moot because by the time the case reached that court, the first step of the reorganization plan had already taken place.[7] (Pet. App. at 20a-27a.) Petitioners seek review of the action of the First Circuit.

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[7] Step one of the reorganization plan occurred on May 16, 1991, shortly after the New Hampshire Supreme Court affirmed the approval of the Rate Agreement by the New Hampshire Public Utilities Commission. *See Appeal of Richards*, 134 N.H. 148, 590 A.2d 586, *cert. denied*, ____ U.S. _____, 112 S. Ct. 275 (1991). Petitioners acknowledge that they knew in advance that the reorganization plan would be implemented when the New Hampshire Supreme Court decision was issued. (Pet. at 31.) The complex financial arrangements executed in step one of the reorganization plan included, *inter alia*, the following:

> issuance of PSNH first mortgage bonds aggregating $342,000,000 in an underwritten public offering; issuance of 5,000,000 shares of PSNH preferred stock at a par value of $25 per share; . . . loans from numerous banking institutions amounting to over $1 billion, guaranteed by the New Hampshire Industrial Development Authority . . . [exchanges for replacement securities of] approximately 32,000,000 shares of PSNH common stock, notes aggregating $205,000,000, and more than 8,000,000 certificates evidencing contingent rights to acquire . . . warrants to purchase common stock in the emergent entity.

(Pet. App. at 21a n.14, 22a.)

Step two of the reorganization plan, the merger of PSNH into a subsidiary of Northeast Utilities and cash out of the PSNH common stockholders took place on June 5, 1992, after the decision below.

ARGUMENT

The Court Of Appeals Correctly Applied Existing Case Law To The Circumstances Of This Case When It Dismissed Petitioners' Appeal As Moot

Because a federal court exercising bankruptcy jurisdiction acts as a court of equity, *see In re Lafayette Radio Elecs. Corp.*, 761 F.2d 84, 92 (2d Cir. 1985) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934) and citing *Dugas v. American Surety Co.*, 300 U.S. 414 (1937)), equitable considerations properly play a major role in determining whether it is possible for an appellate court to grant relief on appeal in a bankruptcy matter. If granting relief would not be equitable because of changes in circumstances in reliance on the order under appeal, a court of appeals sitting on a bankruptcy matter cannot take effective judicial action and the appeal must be dismissed as moot. *See, e.g., Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc.*, 841 F.2d 92, 93 (4th Cir. 1988)("the appeal [was] moot, presenting only an academic question, for, though the [plaintiff's] objections be sustained, the court cannot equitably provide any remedy"); *In re Crystal Oil Co.*, 854 F.2d 79 (5th Cir. 1988)(appeal dismissed because "comprehensive change of circumstances" rendered requested relief "plainly inequitable"); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981). The federal courts uniformly agree on this settled principle of law.[8]

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[8] Petitioners urge this Court to require the courts of appeals to find that relief would be "impossible" to grant before dismissing an appeal from a bankruptcy order. They contend it is not appropriate for the courts of appeals to dismiss on the basis of mootness when they conclude that the harm caused by granting the relief requested by appellants would outweigh any benefit and is therefore inequitable. (Pet. at 49-56.) A court of equity, however, cannot

(*Continued*)

The two traditional equitable considerations on which the court of appeals relied fully justify its conclusion. First, as the First Circuit explained, extensive and complex financial arrangements involving many thousands of individuals and entities and billions of dollars have been executed in reliance on the unstayed order of the bankruptcy court. (Pet. App. at 25a-26a.) Petitioners' challenge to the approval by the bankruptcy court of the Rate Agreement between PSNH and New Hampshire strikes at the cornerstone of the structure that supports all of those transactions. (*See* Pet. App. at 4a-5a.) As the First Circuit noted, "an appellate reversal of the substantially consummated reorganization plan in the present case would 'creat[e] . . . a *nightmarish* situation' . . . and make reconstructive relief extremely improbable." (Pet. App. at 24a-25a)(emphasis added).

Petitioners respond that no one who put new money into PSNH would be hurt by the unraveling of the Rate Agreement because, they assert, the chances are "extremely good" that PSNH would ultimately come out ahead from the resulting years of litigation over its rates. (Pet. at 40.) Petitioners also acknowledge, however, that they cannot guarantee that outcome. (Pet. at 40, 55.) Thus, petitioners offer the new investors in PSNH, both those who put their funds directly into the

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(*Continued*)

award relief that is not equitable. *See Creswill v. Grand Lodge Knights of Pythias*, 225 U.S. 246, 261 (1912) (citing *Saxlehner v. Eisner & Mendelson Co.*, 179 U.S. 19, 35 (1900)). Therefore, petitioners' attempted distinction between situations where appellate relief is "impossible" and situations where appellate relief would be inequitable must be rejected.

Despite petitioners' suggestion to the contrary, the holding in *In re Roberts Farms, Inc.*, is fully consistent with this reasoning. *See* 652 F.2d at 797-98.

reorganization and those who have since purchased an interest in PSNH on the public markets, the chance to join them in speculating on the outcome of litigation.[9]

The investors, however, made their decision to invest in a reorganized PSNH that had resolved the very uncertainties petitioners seek to revive. Whether or not petitioners' strategies might ultimately prove correct, implementing them would effect a fundamental change in the nature of the investment made in reliance on the unstayed bankruptcy court order.[10] That would be inequitable.[11]

The second factor on which the First Circuit relied is the fact that petitioners did not diligently seek to stay the effectiveness of the confirmation order, an action which would

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9 The highly speculative nature of petitioners' scheme is best demonstrated by their repeated suggestions that rather than take the risk of rate litigation, the State of New Hampshire would buy PSNH at a higher value than the reorganization plan placed on PSNH. (Pet. at 22, 40, 56.) In other words, petitioners hope to profit by creating a crisis in New Hampshire that the State would pay dearly to resolve. The State, however, has shown no interest in purchasing PSNH. (*See* Pet. at 24 n.4.)

10 Petitioners blithely assume that the financial institutions which loaned several hundred million dollars to finance the reorganization would not be concerned about the invalidation of the Rate Agreement. (Pet. at 37-38.) The financial institutions, however, included the invalidation or modification of the Rate Agreement as an event of default, (Pet. at 26a n.16), and petitioners' belief that the lenders would not trigger the default provisions is, at best, a wild guess.

11 Remarkably, petitioners claim that "it is impossible to determine at this time whether anyone involved in the case after the Confirmation Order is reversed would object to it." (Pet. at 50.) On the contrary, opposition to such reversal is a foregone conclusion. Apparently, petitioners have overlooked the fact that respondent Official Committee of Equity Security Holders, not petitioners, speaks for the PSNH shareholders.

have limited the harm to third parties that reversal on appeal would now inflict.[12] Petitioners acknowledge that they did not do all they could have to seek a stay, (Pet. at 27-30), and they also admit they were aware of the case law requiring them to do so. (Pet. at 29.) Petitioners urge, however, that they should be excused from that requirement because they did not believe that they would have succeeded in obtaining a stay. (Pet. at 52-53.)

Petitioners' proposal that this Court make the litigants the judges of their own need to follow established procedures is ludicrous. It does not, of course, have any support in the decided cases; its disruptive impact in all areas of the law can only be imagined.

In short, the First Circuit properly applied established law to the facts before it. Petitioners have shown no reason why this Court should review the decision below.[13]

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[12] In the classic language of equity, petitioners do not come to this Court with clean hands.

[13] Petitioners' request that this Court take the extraordinary step of considering their attack on the merits of the bankruptcy court's order despite the fact that the First Circuit did not reach the merits has even less to commend it. Petitioners' self-proclaimed expertise, (*see* Pet. at 16-25), does not provide an adequate record on which this Court should reconsider its recent refusal to constitutionalize the "prudent investment" standard as the basis for state regulation of utility rates. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

CONCLUSION

For the reasons set forth above, respondents request that the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit be denied.

Respectfully submitted,

Respondents, NORTHEAST UTILITIES SERVICE COMPANY, PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

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FOR THE FIRST CIRCUIT

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INTRODUCTION

Petitioners Martin Rochman, Edward Kaufman and Robert Richards ("RKR") hereby reply to the brief submitted by Northeast Utilities Service Company ("NUSCO"), Public Service Company of New Hampshire ("PSNH"), the Official Committee of Equity Security Holders (the "Equity Committee") and the Official Committee of Unsecured Creditors (the "Creditors Committee") (hereinafter referred to jointly as the "Respondents") and the separate brief submitted by the State of New Hampshire (the "State").

DISCUSSION

The Court of Appeals Did Not Properly Apply Existing Case Law When It Dismissed RKR's Appeal

The Respondents claim that RKR is asking the Court to excuse them from the requirements of existing case law, but that is not true.

It is clear that an appeal of a confirmation order should be dismissed if the order has been implemented and as a consequence, it is impossible for the courts to grant equitable relief. RKR does not dispute that rule, but RKR does dispute whether that rule can be properly applied to their appeal.

In all probability, RKR's success will result in an increase in the value of the estate and a distribution of the additional value to the impaired classes in some equitable manner. No innocent third person that has relied on the confirmation order will be injured, and every holder of interests in PSNH including the common stockholders will be better off or at least no worse off.

RKR can not guarantee that result but since all of the prudency audits done on the plant concluded that at least 75% of the investment was prudent

it is a virtual certainty.[1]

Of course, it is possible that some person might appear in the Seabrook rate

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[1]The State says that RKR is wrong because regardless of whether PSNH has the right to recover its prudent investment, PSNH said that it would not have asked to recover more than $1.8 billion of Seabrook, the amount reflected on its financial statements (but not its rate-making books) and the additional $300 million would not have covered the additional interest costs that would accrue during the pendency of the rate case. But Management's statement is not binding on PSNH and if the Confirmation Order is reversed, RKR, and probably the Equity Committee, would insist on PSNH asking to recover much more than $1.8 billion as of January 1, 1990, and with interest until it is fully recovered. And under New Hampshire law (RSA 378:27) PSNH would be entitled to charge temporary rates that recover its prudent investment pending the resolution of the rate case or to apply a surcharge to the permanent rates to recoup the difference.

Also, management's statement was clearly an attempt to curry favor with the State in order to stay in control of PSNH as an investor owned utility and thus a clear breach of its fiduciary obligation to maximize value for the common stockholders and clear evidence that it did not properly represent the stockholders in this proceeding.

case and present some expert testimony that would support a determination that substantially less than 75% of Seabrook was prudent, and thus provide support for a rate order that could result in the common stockholders of PSNH getting less than they got from the Plan but that is surely very unlikely. It is impossible to imagine who would have the resources other than PSNH or the NHPUC to conduct a credible audit and the NHPUC's audit concluded that 93% of the investment was prudent.

If NUSCO had any reason to believe that such a person might appear, it could have presented some testimony to that effect and thereby provided support for a determination that even if PSNH were entitled to recover its prudent investment, PSNH would not necessarily achieve greater value for the common stockholders. But NUSCO failed to pres-

ent any such evidence and therefore it is appropriate to assume that no such testimony would be forthcoming and that, if RKR is successful, PSNH would achieve much greater value in a rate case.

The Court of Appeals refused to make that assumption. It assumed instead that if RKR is successful, PSNH would be back in the bankruptcy court facing essentially the same situation the bankruptcy court thought PSNH was facing when it confirmed the Plan.

The Court of Appeals noted that "appellants' contention that all concerned would be better off if PSNH were to litigate a rate case has been roundly rejected at every turn, in every venue." App. A at 29a. But clearly the Bankruptcy Court confirmed the Plan only because it determined that PSNH did not have the right to recover its prudent investment. Presumably if it had deter-

mined that PSNH had that right, it would not have confirmed the Plan. And if RKR is successful in establishing that PSNH has that right, PSNH would then be in a much better litigating position.

The Respondents argue RKR seeks to revive the many uncertainties that the Plan resolved. But if RKR is successful, they will not revive those uncertainties but settle them even more surely than does the Rate Agreement. [2]

The Rate Agreement was not negotiated on the assumption that PSNH had the right to recover prudent investment. It was negotiated because the State claimed that it had the power to set rates pretty much as it pleased. And

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[2]The institutions that lent money to Reorganized PSNH recognized that the State can not be trusted might renege on the Rate Agreement and made a breach of the Rate Agreement an event of default. But it is surely safe to say that the State will not renege on an obligation mandated by this Court.

the Respondents all supported that claim before the courts because the Plan gave them all what they wanted.

The Plan enabled NU to grab PSNH for a cheap price. The Plan did not give the unsecured creditors all they were contractually entitled to but nevertheless a very good return and probably a better return than they could have gotten from any investment in any other utility in the nation. And the Plan gave the preferred stockholders, especially the holders of the low dividend non-redeemable $100 par preferred that the record indicates dominated the Equity Committee, a very good return. The Plan gave those holders more than they would have gotten if PSNH had recovered all of its investment in Seabrook and had resumed paying dividends on its preferred for then their stock would continue to trade far below par value.

The fact that the Equity Committee chose to allocate the distribution to the preferred in proportion to par value rather than par value plus accrued but unpaid dividends provides irrefutable evidence that the Equity Committee truly represented only the holders of such preferred.

But if RKR is successful, the State will no longer be able to claim that PSNH is not entitled to recover its prudent investment and no one, other than NUSCO and the State, will be willing to accept the result achieved by the Plan. And it is also quite likely that no one else would object to a modification of the Plan along the lines RKR has suggested.

The Respondents say that it is a foregone conclusion that the Equity Committee would object to RKR's proposed modification but of course the Equity

Committee is obliged to say as much at this point. It is simply impossible to believe that, if RKR is successful, the Equity Committee would then object to a proposal that would distribute additional value to the people that it is supposed to represent.

And if RKR is successful the State might very well respond in a rational manner and cause a revived Energy Authority to make a fair offer for PSNH. The Respondents claim that RKR hope to profit by creating a crisis in New Hampshire. But RKR is not trying to create a crisis. RKR is only seeking to require the State to honor its obligations and is merely pointing out how the State can do that and at the same time do its ratepayers a favor.

And RKR's success will not create a crisis. PSNH will continue to operate. The lights will stay on. RKR's success

will result in higher electric rates, if the State does not buy PSNH, but the rates will not cause a death spiral.

If PSNH charged rates designed to recover all of Seabrook in the traditional manner, it might then fall into a death spiral. But the NHPUC is not going to determine that all of the investment was prudent. The audits clearly provide support for a prudency "hit" of some amount. And the NHPUC would cause PSNH to implement a "phase-in" of some sort in any event.

The Respondents say that RKR is asking the Court to declare that the mere assertion of a constitutional right outweighs the interests of thousands of individuals that have relied on the confirmation order. But RKR is not asking for relief based on a mere assertion of a constitutional right. RKR is asking for the opportunity to establish

a constitutional right and if successful for relief based on that right.

If RKR is successful, RKR would expect the Bankruptcy Court, when determining whether and how the Plan should be modified, to balance the injury to the thousands of persons who invested in PSNH in reliance on that constitutional right, with the injury, if any, to the persons that invested in Reorganized PSNH in reliance on the Confirmation Order. And RKR expects, that if the Bankruptcy Court does that, it will find a way to cause the Plan to be modified to provide relief that is equitable to all. Indeed, it is inconceivable that if this Court holds that PSNH has the right to recover its prudent investment, that the Bankruptcy Court would not find a way to cause the parties to agree to a modification of the Plan that is consistent with that right.

In sum, it is clear that it can not properly be said that RKR's appeal is moot because the courts can not grant equitable relief.

But it apparent that the 1st Circuit did not dismiss RKR's appeal because it determined that equitable relief was impossible. It is apparent that it dismissed RKR's appeal because RKR did not make every conceivable effort to get a stay, or as the Respondents put it, because RKR has "unclean hands".

As the Respondents argue, the 1st Circuit looked at RKR as simply three stockholders that care only about their own "parochial" interests and not a whit about the public interest. They argue that if RKR cared more about others, RKR would have more diligently pursued a stay and thereby limited the harm that a reversal would now inflict on innocent

third parties.

But that is patently ridiculous. RKR could not have gotten a stay by merely asking for one and RKR obviously had little if any chance of getting one. RKR could not have put up a bond to cover the possible massive injury to the other parties if RKR's appeal failed and without a bond they could not expect to get a stay on the "mere assertion" of a constitutional right.

And RKR, aware of the dicta that suggested that they must ask for a stay to avoid a dismissal, asked for a stay. They asked the Bankruptcy Court and then the District Court. Their first request to the latter was dismissed for failing to comply with a local rule but their second request was still pending when the Plan was implemented. And when RKR did ask for a stay, the Respondents castigated them for seeking to impose

the risk of severe damages on the impaired classes without offering a bond even though RKR had said that they did not believe they needed a stay and wanted one only if otherwise their appeal would be dismissed.

Clearly, RKR has never sought to injure anyone, not even NU, and if they are successful, they do not expect to. And now that NU has implemented the merger, RKR's success could not possibly harm anyone but NU and NU certainly is not an innocent third party.

And clearly, it is the Respondents and especially NU that have unclean hands. NU negotiated a deal with the State that would take PSNH for the benefit of NU and the State for less than just compensation without regard to the impact of the taking on the common stockholders. And the Respondents issued a Disclosure Statement that told

the impaired classes that they should accept the deal because PSNH would have essentially no rights in a Seabrook rate case. and they have repeated that contention to the Bankruptcy Court, the District Court and the Court of Appeals.

The Respondents have contended throughout this proceeding that Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989) means that a state can deny recovery of prudent investment regardless of the impact on the utility and its investors and therefore has essentially unfettered discretion to set rates. Their interpretation obviously goes far beyond what the Court meant in Duquesne and they surely would not be making it if it did not serve their interests in this proceeding. It is simply impossible to believe that they truly believe what they have been arguing and therefore impossible to believe they have been acting in

good faith.[3] And consequently there is no good reason for the Court to be concerned about the impact a reversal might have on NU.

The Respondents claim that it is well established that if an appellant

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[3] After the Confirmation Order had been issued and RKR had filed their appeal, it became apparent that the Disclosure Statement also misrepresented the value of the merger to the impaired classes. It represented that even if the merger were not implemented, the Plan would achieve a value of approximately $2.3 billion and the common stock of Reorganized PSNH would be worth $20 per share. The Respondents subsequently proved to FERC that if the merger were not implemented, the common stock would be worth far less than $20 and FERC approved the merger, despite the fact that it was anti-competitive, because it recognized that only if the merger was implemented would the impaired classes get what they expected from the Plan.

does not make every effort to get a stay, his appeal must be dismissed, and that it is ludicrous for RKR to ask for relief from that rule simply because they did not think they could get a stay.

But there is no case that so holds. The 9th Circuit in In re Roberts Farms, Inc. 652 F.2d 793 (9th Cir. 1981) gave that as an alternative independent basis for its decision but one can not be certain that the 9th Circuit would have dismissed that appeal simply because the appellant had not asked a Justice of the Supreme Court for a stay if it had thought equitable relief was still possible.

RKR is not asking the Court for relief from a well established rule of law. RKR is asking the Court for relief from a decision that establishes an irrational rule that effectively de-

prives RKR of thier right to appeal and that results in a grave injustice.

The decision, if upheld, will be interpreted to mean that even though RKR may have been right on the merits of their appeal, the courts declined to make an effort to grant relief simply because RKR failed to make every conceivable and probably futile effort to get a stay. It will be interpreted to mean that although the State and NU may have conspired to confiscate hundreds of millions of dollars of PSNH's property, the courts simply did not care.

The Respondents and State argue that the Court should not accept RKR's petition because it does not present an issue of broad or recurring significance. But it clearly does.

A rejection of this petition would cause every appellant in every case to make every conceivable effort to get a

stay even if he does not think he needs one or is entitled to one.

More importantly, if the Court rejects this petition so that it can not either now[4] or later rule on the merits, it will give the investor owned utilities reason to believe that this Court does not care what the states do to them and none of them will ever again, for better or worse, invest in anything but the smallest and most conventional technology.

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[4]The Respondents contend that there is not now an adequate record to which to reconsider its holding in Duquesne but RKR is obviously not asking the Court to reconsider its holding in Duquesne and the Court can not be certain that the record will look much different if and when the 1st Circuit affirms the Confirmation Order. And it is certainly important for the welfare of the nation that this Court and not just the 1st Circuit rule on the merits of RKR's appeal and the sooner the better.

CONCLUSION

For the foregoing reasons, RKR's petition should be granted.

Respectfully submitted,

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